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The BANKING LAW JOURNAL

Combined with THE BANKERS MAGAZINE

VOLUME 62 NOVEMBER, 1945 NUMBER 11

A. B. A. Holds Executive Session and Elects New Officers 841

Certification of Check Withdraws Sum Thereof from Control of Drawer 859

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TRUST AND TAX DECISIONS 914

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THE BANKERS PUBLISHING CO.
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OF NEW YORK

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Condensed Statement of Condition as of September 30, 1945

INCLUDING DOMESTIC AND FOREIGN BRANCHES

(*In Dollars Only—Cents Omitted*)

ASSETS

Cash and Due from Banks and Bankers		$ 893,285,810
United States Government Obligations (Direct or Fully Guaranteed)		2,323,565,991
Obligations of Other Federal Agencies		34,568,891
State and Municipal Securities		165,903,532
Other Securities		98,181,066
Loans, Discounts, and Bankers' Acceptances		1,016,817,136
Real Estate Loans and Securities		6,036,851
Customers' Liability for Acceptances		6,656,465
Stock in Federal Reserve Bank		6,000,000
Ownership of International Banking Corporation		7,000,000
Bank Premises		30,224,729
Other Assets		2,901,562
Total		$4,591,142,033

LIABILITIES

Deposits (Includes United States War Loan Deposit $495,689,738)		$4,298,169,026
Liability on Acceptance and Bills	$11,728,881	
Less: Own Acceptances in Portfolio	4,332,283	7,396,598
Items in Transit with Branches		15,547,338
Reserves for:		
Unearned Discount and Other Unearned Income		1,846,685
Interest, Taxes, Other Accrued Expenses, etc		27,974,881
Dividend		2,015,000
Capital	$77,500,000	
Surplus	122,500,000	
Undivided Profits	38,192,505	238,192,505
Total		$4,591,142,033

Figures of foreign branches are included as of September 25, 1945, except those of branches in the Far East possession of which we have not recovered. For these latter the figures are prior to enemy occupation but less reserves.

$697,088,012 of United States Government Obligations and $8,626,861 of other assets are deposited to secure $626,255,536 of Public and Trust Deposits and for other purposes required or permitted by law.

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STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912, AND MARCH 3, 1933, OF THE BANKING LAW JOURNAL, published Monthly at Boston, Mass., for October 1, 1945.

State of Massachusetts, County of Middlesex, ss:

Before me, a Notary Public in and for the State and county aforesaid, personally appeared Alexander Puglisi, who having been duly sworn according to law, deposes and says that he is the business manager of the Banking Law Journal, and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management (and if a daily paper, the circulation), etc., of the aforesaid publication for the date shown in the above caption required by the Act of August 24, 1912, as amended by the Act of March 3, 1933, embodied in section 537, Postal Laws and Regulations, printed on the reverse of this form, to wit:

1. That the names and addresses of the publisher, editor, managing editor and business manager are: Publisher, Brady Publishing Corp., 465 Main St., Cambridge, Mass; Editor, Joseph A. Nobile, 465 Main St., Cambridge, Mass; Business Manager, Alexander Puglisi, 465 Main St., Cambridge, Mass.

2. That the owner is: (If owned by a corporation its name and address must be stated and also immediately thereunder the names and addresses of stockholders owning or holding one per cent. or more of total amount of stock. If not owned by a corporation, the names and addresses of the individual owners must be given. If owned by a firm, company, or other unincorporated concern, its name and address, as well as those of each individual member, must be given.) Brady Publishing Corporation, 465 Main St., Cambridge, Mass.; K. F. Warren, Lovell, Me.; E. H. Youngman, 20 Midwood st., Brooklyn, N. Y.; Estate of J. R. Duffield, Port Washington, N. Y.; I. V. Butt, Scarsdale, N. Y.; Warren Publications, Inc., 465 Main St., Cambridge, Mass., of which stockholders of one per cent. or more are Lillie F. Warren, Gorham L. Cross, Geo. R. Glendining, all of 465 Main St., Cambridge, Mass., and Keith F. Warren, Lovell, Me.

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4. That the two paragrapns next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders, as they appear upon the books of the company, but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds or other securities than as so stated by him.

5. That the average number of copies of each issue of this publication sold or distributed through the mails or otherwise to paid subscribers during the twelve months preceding the date shown is ..... This information is required from daily publications only.

ALEXANDER PUGLISI.

(Seal)

Henry Lyall,
Notary Public.

(My commission expires May 10, 1946).

Sworn to and subscribed before me this 25th day of September, 1945.

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THE BANKING LAW JOURNAL
Combined with THE BANKERS MAGAZINE

VOLUME 62 NOVEMBER, 1945 NUMBER 11

A. B. A. Holds Executive Session and Elects New Officers

IN place of the general convention, called off on account of the transportation situation, the Administrative Committee of the American Bankers Association held a two-day session in New York in late September, received the reports of the various committees, divisions, departments, etc. and announced the election of Frank C. Rathje, chairman of board and president, Chicago City Bank and Trust Company, Chicago, Illinois, as president of the Association for 1945-1946, to succeed W. Randolph Burgess, vice-chairman of board, The National City Bank of New York, N. Y.

C. W. Bailey, president, First National Bank, Clarksville, Tennessee, was elected vice-president of the Association to succeed Mr. Rathje, and S. Albert Phillips, vice- president of the First National Bank, Louisville, Kentucky, was elected treasurer to succeed Wilmer J. Waller, president, Hamilton National Bank, Washington, D. C., who completed a two year term in that office.

Officers of the Association were elected by members of its Executive Council under emergency provisions of the American Bankers Association constitution which vest the council with this responsibility when by reason of the existence of a state of war or other emergency a general convention cannot be held. The election was conducted by a mail ballot.

The nominations were made by the Nominating Committee, consisting of bankers elected by American Bankers Association members in the 49 states. The names were placed on ballots and sent to all members of the Executive Council. These ballots were returned to the national headquarters and counted, and the election was ratified by the Administrative Committee.

Under the same emergency provisions the members of the executive committees of the four divisions of the Association and

of the board of control of the State Association Section elected a president, a vice-president, and successors to those members of the executive committees and board of control whose terms of office were expiring. These elections were likewise by mail ballot. The following were elected to direct the affairs of these divisions and the section for the coming year:

National Bank Division: Norfleet Turner, president, First National Bank, Memphis, Tennessee, president; Carl K. Withers, president, Lincoln National Bank, Newark, New Jersey, vice-president. Members of Executive Committee: Dunlap C. Clark, president, American National Bank, Kalamazoo, Michigan; J. R. Evans, president, First National Bank, Poughkeepsie, New York; E. C. Otey, president, First National Bank, Bluefield, West Virginia, and Fred M. Roberts, president, First National Bank, Kirkland, Washington.

Savings Division: Myron F. Converse, president, Worcester Five Cents Savings Bank, Worcester, Massachusetts, president; Fred F. Spellissy, vice-president, Market Street National Bank, Philadelphia, Pennsylvania, vice-president. Members of Executive Committee: Mills B. Lane, Jr., first vice-president, The Citizens and Southern National Bank, Atlanta, Georgia; Rowland R. McElvare, executive vice-president, Bank for Savings, New York, N. Y.; A. W. Sands, president, Western State Bank, St. Paul, Minnesota, and J. A. Terrill, secretary and treasurer, New Hampshire Savings Bank, Concord, New Hampshire.

State Bank Division: H. N. Thomson, vice-president-, Farmers and Merchants Bank, Presho, South Dakota, president; James C. Wilson, president, First Bank and Trust Company, Perth Amboy, New Jersey, vice-president. Members of Executive Committee: C. E. Bennett, president, Tioga County Savings and Trust Company, Wellsboro, Pennsylvania; Robert C. Clark, president, Bellows Falls Trust Company, Bellows Falls, Vermont; John S. Coleman, president, Birmingham Trust and Savings Company, Birmingham, Alabama, and Henry E. Schafer, vice-president and manager, Fourth and Union Branch, Seattle Trust and Savings Bank, Seattle, Washington.

Trust Division: James W. Allison, vice-president, Equitable Trust Company, Wilmington, Delaware, president; Evans Woollen, Jr., president, Fletcher Trust Company, Indianapolis, Indiana, vice-president. Members of Executive Committee: John H. Evans, vice-president and trust officer, McDowell National Bank, Sharon, Pennsylvania; N. Baxter Maddox, vice- president and trust officer, The First National Bank, Atlanta, Georgia; John W. Remington, vice-president and trust officer, Lincoln-Rochester Trust Compay, Rochester, New York; Leo A. Steinhardt, president, International Trust

Company, Denver, Colorado, and B. Magruder Wingfield, vice-president and trust officer, The National Bank of Commerce, Houston, Texas.

State Association Section: Ray O. Brundage, executive Manager, Michigan Bankers Association, Lansing, Michigan, president; J. Carlisle Rogers, vice-president, First National Bank, Leesburg, Florida, vice-president. Members of Executive Committee: Paul W. Albright, general sectary, Savings Banks Association of the State of New York, New York City; Harry C. Hausman, secretary, Illinois Bankers Association, Chicago, Illinois, and G. Harold Welch, vice-president and trust officer, The New Haven Bank N. B. A., New Haven, Connecticut.

Frank C. Rathje

Mr. Rathje was born at Bloomingdale, Illinois, about 40 miles from Chicago. He was educated at St. John's Military Academy, Delafield, Wisconsin; Armour Academy in Chicago; received his LL.B. degree from Northwestern University in 1907, and was admitted to the bar in that year.

Mr. Rathje became legal counselor of the Chicago City Bank and Trust Company about 1910, and president of the bank in 1926. In 1916 he became president of the Mutual National Bank of Chicago, which was organized in that year. He has been treasurer of the Chicago and Cook County Bankers Association and its successor, Group One, Chicago District of the Illinois Bankers Association, since October 1930; held practically all the offices and committee chairmanships in the Illinois Bankers Association, and was its president in 1936-1937; member of the A. B. A. Executive Council 1937-1939. He is vice-president of the Union League Club of Chicago this year.

Mr. Rathje is married and lives at Hyde Park, Illinois. He is the father of two daughters, Josephine and Shirley, and two sons, Franklin now with the Navy, and Lt. Theron L. with the Army.

Mr. Rathje owns and operates a modern equipped farm of 333 acres at Palatine, Illinois, specializing in the breeding and raising of Percheron horses, Hampshire hogs, and cattle feeding.

At his inaugural luncheon held on September 28 at the Waldorf-Astoria President Rathje made the following remarks:

The American Bankers Association enters its 71st year of existence today. In its three score and ten years of useful life, it has had 59 presidents. Three of these served for three years each and five served for two years each. By virtue of the action taken today, I have become the 60th president.

To be given a place in the long line of men who have held this distinguished and responsible office, is to be given the greatest honor which is within the power of the banking fraternity to bestow.

Little did I dream, as a boy, on the prairies of Illinois, that I would one day stand in this coveted place.

I am deeply grateful for the honor that the bankers of the United States have conferred upon me. I sincerely trust that I shall merit their confidence. Throughout the year, I shall strive to grow in the understanding of the problems of the banks and their activities in

our national economy. These will be my chief concern during the months ahead.

In our labors throughout the year, I pledge you sincerity and integrity.

As Dr. Burgess leaves the office, I should like to express to him the appreciation of the bankers of the nation. He came into leadership particularly fitted to analyze one of the major problems before the American people. No one in our membership was so well equipped to deal with the complex problems of international finance that became a subject thrown into prominence by the presentation of "Bretton Woods." The bankers of America owe him a great debt of gratitude for the service he has rendered. Neither the public nor the bankers yet realize the benefits which will flow from the contribution he made in the improvement of the Bretton Woods International Financial Legislation.

It did not seem possible a few weeks ago that concurrently with the dawn of peace, we would be inaugurating a new administration of our association. The war lasted so long that it almost appeared to be a way of life, but it has reached its solemn end. As we enter this new year, we shall dedicate ourselves to the tasks of peace no less than we devoted ourselves to the tasks of war.

Of vital responsibility is the success of the Victory Loan. Accomplishment of the goal in this 8th War Loan Drive will be more difficult to achieve than were the quotas in the previous drives. Since hostilities have ended, it will require greater effort on our part. We pledge that effort to the government of the United States.

It is just as important now, as it was previously, to have the Federal debt well distributed. The investment by the public of a part of its buying power in victory bonds will do much to level the factors of inflation and deflation, of which so much has been said throughout the war years. The possibility of inflation is as great as it was while the war was still in progress, possibly greater, now that the strain is over and the urge to satisfy human wants runs stronger. The Victory Loan is our particular responsibility. We must redouble our will to sell the bonds. The drive will begin at the end of next month. Our Treasury War Borrowing Committee, our Committee on War Bond Drives and our staff are devoting themselves to the problems of organization and the preparation and distribution of promotional material of various kinds.

If we want to express our gratitude toward those, who by sacrifice of blood and suffering, made world peace possible again, here is a place to begin.

Today one of our most urgent needs is service to the war veterans. We acknowledged our responsibility in this field a year ago when we created our committee on service to war veterans. We recognize that the discharge of this responsibility involves more than the making of loans; that it involves as well, the many things that will help the veteran to re-establish himself in civilian life; that it calls for human understanding and practical help.

During the year, we have had a great deal of experience. This has been but a form of training for the bigger job ahead as millions of men and women are discharged from the service. Nationwide machinery has been perfected among the banks. Our committee has worked closely with the Veterans' Administration, Veterans' Organizations and the Army and Navy, and it has given the committees of Congress the benefit of its knowledge and experience. The banks have cooperated with local groups devoted to the veterans' interests.

Progress has been made, and we take pride in what has been accomplished. There has, however, been dissatisfaction with the operation of the Veterans' Readjustment Act, commonly known as the "GI Bill of Rights." This law is not clear or practical. As a result, the regulations have been complicated. Functioning under the act has been difficult for all concerned, including the veterans themselves. For months, Congress has been considering revision. There have been many discussions and there have been many proposals. As a result of a study made for the Veterans' Administration, Mr. Bernard Baruch has urged that the act be "overhauled." In this activity, our association should take a leading role.

In an address closing the Japanese Surrender Proceedings on board the Battleship Missouri in Tokyo Bay, on September 2nd, General MacArthur paid tribute to the men who won the victory. In concluding his remarks, he said, "They are homeward bound. Take care of them." In that spirit we must approach this problem with fairness and generosity.

It is my personal opinion that if the best interests of the veterans and the country are to be served, there are certain broad principles that should be recognized as guide posts in the drafting of legislation on this subject. These principles include equal and equitable provisions for all veterans and all classes of veterans, fairness to the Federal treasury, to the national economy and to the American taxpayer. It is to be borne

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Condensed Statement of Condition as at close of business September 30, 1945

RESOURCES

Cash and Due from Banks	$ 393,840,494.76
U. S. Government Securities	1,294,612,871.08
U. S. Government Insured F. H. A. Mortgages	4,456,785.26
State and Municipal Bonds	39,077,613.02
Stock of Federal Reserve Bank	2,475,000.00
Other Securities	23,621,340.29
Loans, Bills Purchased and Bankers' Acceptances	395,050,988.65
Mortgages	13,153,612.65
Banking Houses	11,512,530.67
Other Real Estate Equities	423,280.73
Customers' Liability for Acceptances	4,232,670.74
Accrued Interest and Other Resources	6,091,489.36
	$2,188,548,677.21

LIABILITIES

Capital	$41,250,000.00	
Surplus	41,250,000.00	
Undivided Profits	29,007,450.22	$111,507,450.22
Reserve for Contingencies		8,488,073.68
Reserves for Taxes, Unearned Discount, Interest, etc.		5,408,485.34
Dividend Payable October 1, 1945		1,237,498.20
Outstanding Acceptances		4,741,439.12
Liability as Endorser on Acceptances and Foreign Bills		528,202.25
Deposits		2,055,637,528.40
		$2,188,548,677.21

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Principal Office: 55 Broad Street, New York City

69 BANKING OFFICES IN GREATER NEW YORK

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in mind that the returning service man was a soldier yesterday, is a veteran today, and will be a civilian taxpayer tomorrow. The law should provide for such simplicity of administration that all lending institutions will be able to give equal, competent and effective service. Meanwhile, we must continue to serve the veteran to the best of our ability with the machinery that we have in hand.

Another essential, is the financing of peace-time business. Reconversion must and is being financed, but, beyond that, business must be assured of continuing credit. We must not only maintain a sound and prosperous economy, but we must also maintain a land of opportunity with freedom of private enterprise. Small business in particular must have the assurance of adequate credit if opportunity is to be preserved.

With the war's end and the present status of our economy, we can well afford to appeal for a re-establishment of the philosophy of thrift. Throughout our formative years, the judicious use of money and credit were fundamentals in the American way of life. America was built by the thrift of her people. Savings gave value to her land, built her cities, made possible her industries, her great transportation and communications systems, and other attributes of community life. They gave strength and independence to our nation. The accumulation of capital is just as necessary to a sound economy in the future, as it proved essential in the prosecution of the war. The encouragement of saving is the basic function of banking. Through it, we can better serve more people than in any other way. In recent years, thrift has been overshadowed by the emergency of war, and justly so, but now that the war has been gloriously won, all-government, banking, industry, and the individual citizen should devote themselves to the re-building of that fundamental which is so vital to the nation's welfare. The re-establishment of the philosophy of thrift must be the keystone in the reconstruction of our economy.

Through the years, the Association has served all banks, large and small. To serve all of the banks, we must of necessity direct our thinking toward the requirements of a given institution, which, for lack of a better term, we may call the "Average Bank." The average bank is the common denominator of all banks. In it are wrapped up the needs and interests of all. If we serve it well, we shall succeed in serving all well. In this way, we shall achieve the greatest good for the greatest number.

We have missed, during the past two years, the meetings of the membership. I hope that in the near future, we may be able to resume these activities in the field. I know the staff is anxious to have closer contact with the membership. The committees, commissions and councils desire more general discussions of the matters with which they deal. As soon as conditions permit, we shall undertake to hold meetings again in various sections of the country where we can take joint counsel.

As we start the new year, I am reminded of an incident described recently by Dr. Franklin Snyder, the president of Northwestern University. He told of an experience related to him by a young naval officer bound from our shores for service in the Far Pacific. It appears that one day while a group of ensigns were engaged in writing letters, a ship's officer entered their quarters and said: "You boys want to remember that we have just crossed the international date line, so it isn't today any longer. It's tomorrow."

Aboard a ship travelling homeward through those same waters, it would have been appropriate for the officer to have said, "It isn't today now, it's yesterday." There will always be those who live in the day that is gone, but I am sure that the bankers of the nation visualize Dr. Snyder's "Tomorrow."

Chart your course as you will, the world we live in approaches the dawn of a new day. In that day, we must find our destiny. As we do, I look forward to an experience rich in adventure, gratifying in accomplishment.

At the same luncheon W. Randolph Burgess, retiring president, made the following remarks:

If we had three or four hours I should like to tell you about the work of the American Bankers Association during the past year. It is a dramatic story and a full story of the volunteer efforts of hundreds of bankers who have piled on top of their own crowded days devoted for banking as a whole and, beyond that, for sound economic policy in the United States. Bankers generally do not realize the debt we owe to our committee chairmen and members, as well as to the busy staff which works constantly at high pressure under the inspiring leadership of Harold Stonier.

What I must not fail to pass on to you in this swan song is something of what I have learned about the broader meaning of the Association as I have seen it intimately at work in New York, Washington, and many other parts of the country.

The meaning of the Association goes as deep as democracy itself in these

United States, and I will try to tell you why.

We have learned in this war by bitter experience that if we are to continue to have democracy in the United States we must not take it for granted. In the war emergency we had to work for it, fight for it, and even die for it; but now that the war is over there is danger that we will again relax our vigilance. That we all agree, must not happen. Sporadic patriotism is not enough. In peace time, as in war, if we truly value democracy we must continue to work for it and fight for it, with unremitting care and devotion.

In the war, we fought and overcame a threat to our democracy from without. There are other threats from within. A recognition of this danger is attested by many recent volumes and articles on democracy and its meaning. We are beginning to realize that many of our people have been so accustomed to living in freedom that they have been perilously casual about it. Only now, with the emergence of so many totalitarian governments, are we beginning to ask "What is democracy? How is it better then other forms of government? Do we really want it here? And are we in any danger of losing it?" The recent English election makes us wonder in what direction that kindred country is tending, and where we ourselves may already have drifted.

The change in our national budget shows dramatically one thing that has been happening in the United States. Estimates from various sources place the post-war budget at from 20 to 25 billion dollars compared with 7 to 8 billion in 1938 and less than 1 billion before World War I. Government is big and growing bigger. Much of this is the inevitable result of doing the things all the people agree must be done by government. We must pay the interest on our debt; we must take good care of the veterans; social security is with us to stay; we must do our share in restoring a sick world and doing everything possible to prevent another war. These essentials mean a bigger government than ever before. But big government has its dangers as well as its virtues, especially when there are many people who believe in much bigger government, in state socialism.

John Stuart Mill points out that for the success of the free enterprise, which is the economic source of wealth in a democracy, the prime essential is security, —the protection society affords to its members. But, note this: Security means not only protection by the government, but protection against the government. Mill says, 'The latter is the more important," and he adds, "The only insecurity which is altogether paralyzing to the active energies of producers is that arising from the government or from persons invested with its authority." Insecurity of the sort Mill mentions was certainly responsible at least in part for the long duration of the economic depression of the 30's.

Thoughtful people are today wondering whether government in this country may not be getting so big that it threatens not only productive enterprise but with it the liberty of the individual which is the essence of our democracy. On every hand the question is asked, "What should we do about it?" It is not enough "to be against the government," or to say government should be restrained and that we should all vote for government officials who oppose too great government expansion. The problem is not so simple as that; and even with the highest political ideals government will make serious economic blunders unless it receives the help and cooperation of business and professional leaders. There need to be organizations to give continuing attention to the larger problems of government and its relation to private enterprise.

On that subject a new essay by Charles Beard, who is certainly no hidebound conservative, contains this sentence:

"If there are no individual or group economic interests possessing a high degree of independence as against the state, despotism will supplant constitutional government and then run its own historic course."

This is an utterly convincing reason for having an enlightened and aggressive American Bankers Association. Banking in the United States is a definite economic force—a force that works with our government and with our citizens in support of our democratic free enterprise. The American Bankers Association gives banking a voice to make itself heard in behalf of the interest not alone of the 270,000 workers who man the banks, but of the millions of depositors.

Some people have failed to recognize the great purposes of the Association because it has not used the spectacular methods of power politics. It has wisely chosen as its duty and method—education, —the most powerful force in human affairs. The primary educational duty is to help banking do its own job better. The second educational task is to help others understand banking and its crucial place in the body economic. This is by all odds the most effective way of fulfilling our duty as an independent economic force playing its part to support sound financial policies in our democracy.

The educational program of the Associa-

tion is more than language. It has real substance. Starting with the 26,000 bank workers studying in the American Institute of Banking despite wartime pressures and the 600 selected younger executives pursuing the arduous course of The Graduate School of Banking, adding to these the thousands of meetings where banker and farmer and banker and businessman discuss their mutual problems, and the array of Association publications from banking magazines to bulletins on banking and economics, and going on to the patient painstaking hours that banking committees have spent in Washington explaining to members of the Congress and the Administration the facts and the banking viewpoint of the questions before them which concern banking, all this is a giant educational program of organized banking.

This is a great responsibility—a great opportunity. We have just completed another year of operation of the Association devoted to this great purpose. It has been a year of achievement in which to take pride. It represents the hard, patient, devoted efforts of hundreds of bankers. These people have a vision of what banking can do for democratic enterprise and the way banking can serve as a wholesome economic force in this country. That is why it has been a great privilege to serve as the Association's president.

C. W. Bailey

Mr. Bailey, the new vice-president, was born in Clarksville, Tennessee, and educated in the public schools there. He was first employed by the First National Bank of Clarksville in 1904 as assistant cashier; he was elected cashier in 1908, and he became president in 1920. He is also president of the Southern Trust Company of Clarksville. He served as president of the Tennessee Bankers Association, 1929-1930; was chairman for several years of the agricultural committee of the Tennessee Bankers Association, and was in that position when the Tennessee bankers first achieved the 1,000 point rating of the Agricultural Commission of the American Bankers Association.

Mr. Bailey has been president of the Tennessee Taxpayers Association since its organization in 1932. This is a statewide organization of taxpayers supported by voluntary contributions, devoted to economy and efficiency. He has served for a number of years as chairman of the agricultural committee of the Chamber of Commerce of Montgomery County, Tennessee.

During the past year Mr. Bailey was chairman of the Agricultural Commission of the American Bankers Association. He has been a member of the faculty of The Graduate School of Banking for a discussion of country banking, and an evening seminar lecturer at the resident sessions of the school, which is conducted by the Association at Rutgers University, New Brunswick, N. J.

Mr. Bailey developed the "Four Pillars of Income," an agricultural program of his bank, which has served to encourage diversified farming in the Clarksville trade area.

He has been active in numerous civic affairs, and a co-chairman for Montgomery County of the various War Bond drives; a member of the executive committee of the Clarksville chapter of the American Red Cross, and a member of the executive committee of the Cogioba Council of the Boy Scouts of America.

Mr. Bailey is married and has three children.

S. Albert Phillips

S. Albert Phillips, the new treasurer, was born in Laurel

County, Kentucky. He was educated in the public schools and at Sue Bennett Memorial College, London, Kentucky, and Cumberland College, Williamsburg, and completed his business and commercial education at the University of Kentucky, Lexington.

His first business connection was as bookkeeper and assistant cashier with the State Bank and Trust Company, Stanford, Kentucky. After two years he resigned and joined the Phoenix Third National Bank of Lexington. Four years later, in 1917, he entered the credit and general accounting department of Sherwin-Williams Company at Cleveland, Ohio. In 1918 he joined the United States Army and was sent overseas as sergeant-major in charge of office work at a base hospital in Paris. When he returned in 1919, he became assistant cashier of the First National Bank, Corbin, Kentucky, and in 1924 he became Deputy State Banking and Securities Commissioner by appointment from the governor. In 1928 Mr. Phillips became vice-president in charge of the Bank Relations Department of the First National Bank of Louisville, the position he now holds.

In the activities of the American Bankers Association, Mr. Phillips has served on the Executive Council; the Membership Committee; ex officio Bank Management Commission; the Executive Committee of the National Bank Division, and as chairman of the committee 1940-1941. From 1941-1942 he was vice president of the division, advancing to the presidency in 1942. He has served as a member of the Nominating Committee from Kentucky, and has been active in the Kentucky Bankers Association. During the past two years he has been A. B. A. War Bond chairman for Kentucky.

Mr. Phillips has been active in civic and community affairs, having served on various public boards in Louisville and in the state of Kentucky. He is secretary of the Kentucky Old Masons Home, and for a number of years he has been treasurer of the Kentucky School for the Blind. He is a member of the U. S. O. executive committee and treasurer of the body. Mr. Phillips is married and resides in Louisville.

Norfleet Turner

Norfleet Turner, new president of the National Bank Division, is president of the First National Bank of Memphis, Memphis, Tennessee.

Mr. Turner is a native of Memphis. He received his education in the Gulf Coast Military Academy and Washington & Lee. University. He began his business career with the Union & Planters Bank and Trust Company, Memphis. Later he became associated with the Commerce Securities Company. In 1929 he was made vice-presdent and manager of the First Securities Corporation, an affiliate of the First National Bank. In 1930 he became vice president of the First National Bank and in 1937,

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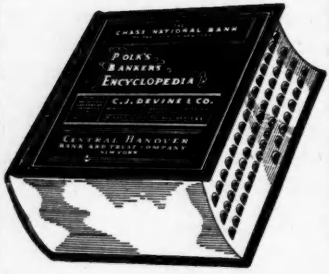

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executive vice president. He has been president of the bank since January 1943.

Mr. Turner is a director of the Community Fund and a director of the American Red Cross. He is a member of the Memphis Chamber of Commerce, Reserve City Bankers Association, and the Memphis Rotary Club. He is married and has two children, Norfleet Ragland and Elinor Eugenia.

Carl K. Withers

Carl K. Withers, new vice president of the National Bank Division, was advanced from the post of chairman of the division's Executive Committee. He is president of the Lincoln National Bank of Newark, New Jersey.

Mr. Withers was born and educated in Scranton, Pennsylvania, later receiving his B.A. in finance at Rider College, Trenton, New Jersey. He began his banking career in Scranton. After serving as an ensign in the U. S. Navy during World War I, he became trust officer of the First-Mechanics National Bank, Trenton, New Jersey; served as commissioner of banking and insurance for New Jersey 1935-1938, and since then he has held his present position as president of the Lincoln National Bank of Newark.

Mr. Withers has served as secretary of Scranton Chapter of the American Institute of Banking in 1916; as one of the organizers and first president of Trenton Chapter, A.I.B.; as president,

Mercer County Bankers Association and New Jersey Bankers Association, as well as on the Executive Council and numerous committees of the American Bankers Association. He has also been treasurer of the Newark Clearing House Association, and member of and Banking Law Revision Committee of the New Jersey Bankers Association. During the past year Mr. Withers has served as chairman of the Executive Committee of the National Bank Division of the A. B. A.

In civic activities, Mr. Withers has been chairman of the Newark Defense Council; member, executive committee, National War Fund and Community Chest, including local U. S. O. and Y. M. C. A., and others; chairman, advisory board, The Salvation Army; president, Advertising Club of Newark; member, local, county, and state War Bond committees, and director, Broad Street Association, Kiwanis Club, and Newark Athletic Club. Mr. Withers is also a member of Nobles of the Mystic Shrine and the Baltusrol Golf Club.

Myron F. Converse

Myron F. Converse, new president of the Savings Division of the American Bankers Association, was advanced from the post of vice-president of the division to which he was elected a year ago. He is president of the Worcester Five Cents Savings Bank in Worcester, Massachusetts.

Mr. Converse was born in Worcester and has spent his entire business life there. He began his career with the Worcester Five Cents Savings Bank in 1894, serving successively as clerk, clerk of corporation, assistant treasurer, treasurer, vice president, and finally president. He has been president of the bank since June 28, 1927.

Mr. Converse is president of the Mutual Savings Central Fund, Inc. in Massachusetts, and vice president of the Worcester Mutual Fire Insurance Company. He is a director of the Mechanics National Bank, the State Mutual Life Assurance Company, and the Norwich and Worcester Railroad Company. He is a past president of the National Association of Mutual Savings Banks, of the Savings Banks Association of Massachusetts, of the Massachusetts Bankers Association, and of the Massachusetts Savings Bank Officers Club.

He is identified with many of the social and charitable organizations and institutions of Worcester, and is president of the Worcester County Horticultural Society and of the Worcester Natural History Society. He is also a past president of the Worcester Rotary Club and the Worcester Economic Club. He is a member of the Governor's War Garden Committee and chairman of Local Board No. 165 of the Selective Service System.

Mr. Converse is married and lives in Worcester.

Harold N. Thomson

Harold N. Thomson, new president of the State Bank Division, was advanced from the post of vice-president of the division, which office he has held for the past year. He is vice-president of the Farmers and Merchants Bank, Presho, South Dakota.

Mr. Thomson was born in Ingalton, Illinois. He attended the South Dakota School of Mines, and Washington University in St. Louis, Missouri, receiving his Bachelor of Science degree from the latter institution in 1925. He graduated in 1940 from The Graduate School of Banking, conducted by the American Bankers Association at Rutgers University, New Brunswick, New Jersey.

For two terms Mr. Thomson served on the South Dakota Banking Commission. He is a past president of the South Dakota Bankers Association. In addition to being vice president of the Farmers & Merchants Bank, Presho, he is vice president of the Farmers & Merchants Bank, Wessington Springs, South Dakota.

James W. Allison

James W. Allison, new president of the Trust Division, is a native of Richmond, Virginia. He received his education at Woodberry Forest School, Woodberry Forest, Virginia; Columbia University, and Columbia Law School.

During World War I, Mr. Allison served with the U. S. Naval Reserve Force, first as an ensign and then as a lieutenant junior grade. Returning from the war, he became an assistant trust officer of the First National Bank of Richmond, being advanced to trust officer in 1928 and vice-president and trust officer in 1934. Since 1936 he has been vice-president in charge of trusts at the Equitable Trust Company, Wilmington, Delaware.

Mr. Allison has served on various committees of the A. B. A. Trust Division, such as the Committee on Trust Accounting, Committee on Trust Education, Committee on Trust Policies, Committee of Liability Insurance for Fiduciaries, and the Committee on Trust Department Personnel Nomenclature. He has also served on the Public Relations Council and the Research Council of the Association.

Mr. Allison was chairman of the Executive Committee of the Trust Division, 1943-1944, and vice president of the division in the year 1944-1945.

Evans Woollen Jr.

Evans Woollen Jr., new vice-president of the Trust Division, is president of the Fletcher Trust Company in Indianapolis, Indiana.

Mr. Woollen was born in Indianapolis, and was educated at Hotchkiss School and Yale University, obtaining his A. B. degree from the latter in 1920. He started his business career in 1920 as a bank clerk, being identified with the Fletcher Trust Company since that time, and in

1935 he was elected president and director of that bank. He was vice-president and director of the Fletcher Joint Stock Land Bank from 1935 to 1943.

Mr. Woollen was a director of the Family Welfare Society from 1923 to 1933, and was appointed to the Indianapolis Board of Public Health and Charities in 1930, elected president in 1931, and served until 1933. From 1933 to 1935 he was Indianapolis City Controller. From 1938 to 1942 he was a member of the Indianapolis Board of School Commissioners, serving as president in 1941. He was also a director of the Indianapolis Community Fund from 1937 to 1943 and was elected again to the board in 1945. In 1942 he was appointed Indiana state chairman of United China Relief, which position he still holds. He is a trustee of the National Health and Welfare Retirement Fund, having been elected to the board in 1944. Since 1942 he has been vice president of the Indianapolis Clearing House Association. He has also been actively identified with educational activities in his home state.

In 1943, Mr. Woollen was elected to membership on the executive committee of the Trust Division of the American Bankers Association, and became chairman of that committee in 1944. He has been a member of the American Bankers Association Subcommittee on Federal Deposit Insurance Study since 1943.

During World War I, Mr. Woollen served as Second Lieutenant in the 73rd Field Artillery.

Mr. Woollen is married and has three children. His home is in Indianapolis.

Ray O. Brundage

Ray O. Brundage, new president of the State Association Section, began his business career with the Henderson-Ames Company in Kalamazoo, with which he was identified for ten years. Later he became assistant to the president of the old Kalamazoo Savings Bank, serving in that post for eight years. He then became secretary of the Chamber of Commerce in Kalamazoo, with which he served five years, and which post he left to become assistant to the president of the Kalamazoo Vegetable Parchment Paper Company.

Mr. Brundage served the state as commissioner of pardons and paroles from 1931 into 1933. The following year he became executive manager of the Michigan Bankers Association. From 1939-1940 he was president of the Central States Conference, composed of the officers of the bankers associations of 14 middle-western states. During the past year he served as vice president of the State Association Section of the American Bankers Association. Mr. Brundage has been secretary-treasurer of The Brundage Company in Kalamazoo, since 1925.

J. Carlisle Rogers

J. Carlisle Rogers, new vice-president of the State Association Section, is secretary of the Flor-

ida Bankers Association, Leesburg, Florida, and cashier of The First National Bank of Leesburg.

Mr. Rogers has been with the First National Bank of Leesburg since 1922, having been made assistant cashier in 1926, cashier in 1933, and vice-president in 1944. He was elected secretary of the Florida Bankers Association in 1939, and has served continuously since then. He has also been secretary and president of Secretaries of Southern States Bankers Associations.

Mr. Rogers is a director and served two terms as president of the Chamber of Commerce of Leesburg. He is a member of the following Leesburg organizations: Kiwanis Club; Junior Chamber of Commerce; Masonic Lodge; Board of Governors of the Leesburg Recreational Center, and the City of Leesburg Planning Commission. He is chairman of the Board of Supervisors Lake Soil Conservation District, and chairman for the second year of the Lake County National War Fund. During the past year he has been a member of the executive committee of the State Association Section, American Bankers Association.

Committee on State Legislation

Of special interest to readers of THE BANKING LAW JOURNAL is the report of the committee on state legislation of which G. O. Thorpe, executive vice-president, First and Lumbermen's National Bank, Chippewa Falls, Wisconsin, was chairman. The text follows:

Bank law revision: Kansas, New Jersey, Vermont, and Wisconsin have been aided in revising their banking laws. The members of our Committee on State Legislation, particularly those of the Subcommittee on Model State Banking Code, as well as members of the staff of the A.B.A., and other interested persons have rendered invaluable help in examining the proposed drafts of the revisions.

The committee has had definitely in mind for years the preparation of a model state banking code. It intends to complete shortly an important initial step; a list of subjects pertinent to such code, which will serve the purpose of a standard outline for a digest of state banking laws. Many volunteers are ready to aid in such a digest.

A model code will be invaluable in strengthening, modernizing, and streamlining state banking laws, although it will be merely suggestive as to substance and form. A state bankers association, of course, is free to accept or reject any provision.

A committee of the New York Safe Deposit Association has prepared a tentative draft of a model safe deposit corporation law.

State taxation of banks: Statutes materially affecting bank taxes have been enacted in Alabama, California, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Jersey, New York, North Carolina, and Vermont.

Following the precedent of the 1939 "Bank on Wheels," a statement of the condition and earnings and expenses of a hypothetical state bank and a national bank with identical assets and earnings has been sent to each state, and local bankers throughout the country have computed aggregate taxes for the 1945 state and national "Bank on Wheels." Interesting and valuable statistics are being compiled.

Enactments in 1945 have been many, varied, and significant. Each item on the list below is a matter of live human interest. Many have dollars and cents value of no mean proportions. An explanatory statement as to any enactment will be sent on request.

Recommended measures on regular program: Enactments in 1944 are included so that the lists may be a cumulative supplement to the "Progress Chart in Banking" for December, 1943. These are:

Competency of notaries: Idaho, revision of recommended draft.

Deposits in two names: Alabama added provision for title in survivor; Oklahoma included minor as joint depositor; Wiscon-

sin, certificate of termination of joint tenancy and of survivorship.

False statements for credit: Idaho.

Fictitious Payee: California, Georgia, Missouri, New Mexico, Wisconsin.

Final adjustment of statements of account: Wisconsin.

Holiday bank transaction statute: South Carolina (1944).

Non-member bank reserves: Alabama (time deposits only).

Non-payment of check through error: Mississippi (1944), Wisconsin.

Payment of forged or raised check: Georgia, which had recommended act, added forged indorsement statute.

Payment of stale check: Maryland (6 months).

Time limit on stop payment: Arkansas, Maryland, Mississippi (1944), Wisconsin.

Uniform fiduciaries act: Minnesota.

Uniform principal and income act: Pennsylvania.

Uniform stock transfer act: Delaware, District of Columbia (1944), Kentucky (1944), Nevada, Oklahoma, South Carolina, Wyoming (leaving only Iowa, Kansas, Mississippi, Vermont).

Uniform trust receipts act: Idaho, Montana, North Dakota, South Dakota, Virginia (1944), Utah.

Uniform warehouse receipts act: South Carolina (now in all states).

Other measures, not including those of primary concern to trust division:

The model act reporting violations of banking law: Idaho.

Accounts receivable. The total enactments to date are: Validation (15), Arkansas, Connecticut, Illinois, Indiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, Oregon, Rhode Island, South Dakota, Virginia, Wisconsin; Filing (7), California, Idaho, Missouri (or notice to debtor), North Carolina (or notice), Ohio, Texas, Utah; Book-marking or notice (2), Georgia, Pennsylvania.

Aircraft recordation with Civil Aeronautics Administrator: Florida.

Destruction of obsolete records: Wisconsin.

Capital and surplus; ratio to deposits: California, Minnesota, Nebraska, Wisconsin.

Currency exchanges: Illinois, Wisconsin.

Delayed posting: Florida, Oklahoma, Pennsylvania, Utah, Wisconsin.

Directors' reimbursement for costs of unwarranted claims: Michigan, New York, Pennsylvania.

Escheat of bank deposits: California, New Jersey, New York.

Examination; number reduced: Georgia.

Factor's lien: Connecticut, Maine, Maryland, Massachusetts, Missouri, North Carolina, Ohio, West Virginia.

Fair employment practices: Indiana, New Jersey, New York, Wisconsin.

Interest rate reduction in absence of contract: Florida 8 per cent to 6 per cent; Wisconsin 6 per cent to 5 per cent.

Motor vehicle certificate of title; trailers: Indiana, Michigan, Montana, Nebraska, Nevada.

Par collection: Nebraska.

Reports; number reduced: Wisconsin.

Safe deposit law revision: Illinois, Minnesota.

Loans, particularly limitation to one borrower, personal loans and real estate loans, have been a prolific source of legislation. The mimeographed chart of June 27, 1945 gives information as to regular real estate loans as compared with GI real estate loans. This chart has been brought up to date by a supplemental memorandum. GI minors' enabling legislation has been enacted in 1945 in Alabama, Arizona, Arkansas, Colorado, Connecticut, Georgia, Illinois, Kansas, Kentucky, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Wisconsin, Wyoming. The Arizona statute has been construed by the Arizona Supreme Court and extracts from the opinion have been mimeographed.

Report of Trust Division

Also of particular interest to readers of THE BANKING LAW JOURNAL is the report of the trust division made by its president, Frederick A. Carroll, vice-president of the National Shawmut Bank of Boston. Since making this report Mr. Carroll who was on leave as American Red Cross Commissioner in Europe was tragically killed in an automobile accident near Paris. The text of his last report follows:

This is the fourth annual report of the Trust Diision since Pearl Harbor. Little did we realize at that time that the war would last as long as it has. Little did I realize then that I would be president of the Trust Division in 1945—and certainly I had no idea that I would be in Paris, France, serving the American Red Cross,

instead of being in my office in the Trust Department at Boston. Indeed the world moves on—the world in which the future of trust service must be built.

In the talk I prepared for delivery at the February Mid-Winter Trust Conference, canceled because of war conditions, I stated that ever since the first trust was established in this country there have been changes in general conditions which have put increased responsibility on the trustee. Certainly in the life of the Trust Division changes seem to have increased in number in an accelerated and progressive way. In recent years they have come upon us pretty fast. Industrial and agricultural development, growth and shifts of population have brought about changes in the financing of real estate and business. With a change in the philosophy of government in the relation of business to government, in the relation of labor and business, and of labor and government, has come increased responsibility to the trustee. Changes in our social, political, and economic existence have brought about many changes in the kind and amount of taxes. All this has caused many new responsibilities to be added to the trustee. Many times has the question of these additional responsibilities been discussed, and I am sure there is no need for me to emphasize that situation now. It has challenged us many times and it is still a challenge how to accept these additional responsibilities, to accommodate ourselves to them properly in the matter not only of costs and charges, but also in our ability to have a skilful personnel to keep our pledge to do the job well.

Everything changes and the changes have come so quickly during these last few years there is not much that is certain except that we will surely have uncertainty.

In all of our work in the Trust Division this year we have been keenly aware of these great changes that have taken place and those in store for us around the corner. Many of our committees are now engaged in exploratory work which will take form and come to you in reports in the days ahead. In this annual report I can only tell of the specific projects completed this year and touch briefly on those "in the works.'

The Committee on Taxation has been very active since last September on several important matters. One of the most important dealt with the further extension of time for the release of powers of appointment, which was again extended to July 1, 1946. If this recommended extension had failed, donees of powers of appointment in existing estates would be unable to free the estate from additional federal estate tax burdens. Another was the amendment of the federal income tax law on employees' trusts, extending to June 30, 1945, the time within which to qualify employees' trusts in existence before January 1, 1945. The law was further amended to allow 75 days after the close of an employer's taxable year within which to qualify employees' trusts created after December 31, 1944. These extensions were incorporated into the code before the end of the year.

Two decisions concerning the federal estate tax on transfers subject to reversionary interests were handed down by the United States Supreme Court on February 5, 1945. The cases were Fidelity-Philadelphia Trust Company (Stinson Estate) v. Rothensies (65 S.Ct. 508), and Commissioner v. Fields (65 S.Ct. 511). The opinions of the Court will have far-reaching results in the determination of the federal estate tax on trusts created inter vivos unless corrective legislation is enacted.

This committee has been working on a comprehensive tax study based on the historical background and the development of trusts, their use as a medium for the conservation of property for the benefit of dependents, and their importance in the general social and economic scheme of our whole property system. The study will include a brief history of federal taxation of estates and trusts, beginning with the 1913 Revenue Act, showing the statutory development down to the present time and will cover interpretations and regulations relating to the estate and trust sections of the tax laws and leading court decisions.

Our Committee on Employees' Trusts has had a very active year in this comparatively new field of trust service. Because of its newness many problems have arisen in regard to bureau regulations and interpretations, fees, operating, and administrative problems. This committee has written to 193 trust institutions, known to be handling employees' trusts, asking for operating forms they are using and for any administrative and operating problems they have encountered in this type of business. Seventy-three replies have been received and this committee, in conjunction with the chairman of our Committee on Operations for Trust Departments is studying the material. A joint report on this subject will be published in the fall. As part of the work of this committee, the chairman wrote an article for the special 52-page edition of the "Journal of Commerce" of May 15, 1945, which was devoted exclusively to "Pension and Profit Sharing Plans."

The common trust fund movement is progressing at a steadily accelerating pace throughout the country. Three states—Marvland, New Jersey, and West Virginia—adopted enabling acts in 1945, which brings the total number of states having common trust fund enabling legislation to

26. In 16 of these states, a total number of 34 trust institutions are administering common trust funds. Six of these funds were established this year: one in Baltimore, Maryland; one in Boston, Massachusetts; two in New York City; one in Rochester, New York, and one in Cincinnati, Ohio.

Until last July, the investment of any one trust in a common trust fund had been limited under Regulation F to $25,000. Our committee believed that this limit should be increased to $50,000 and discussed this matter with the Board of Governors of the Federal Reserve System. I am happy to report that Regulation F has now been amended and the limitation on investments in common trust funds has been increased to $50,000, effective September 1, 1945. One state, Pennsylvania, where there are 9 trust institutions which administer common trust funds, in this year's legislature had passed anticipatory legislation amending its common trust fund law to take advantage of the increased limit of participation to $50,000 provided Regulation F was so amended.

As a guide to trust institutions in adopting a wise policy regarding the advertising of common trust funds, a statement of policy on the subject was formulated by the Committee on Common Trust Funds in co-operation with the Committee on Trust Information. This statement, after approval by the Committee on Trust Policies and the Executive Committee, was published in the March, 1945 "Trust Bulletin." Regulation F, as amended, now provides that "a bank administering a common trust fund shall not, in soliciting business or otherwise . . . advertise or publicize the earnings realized on any common trust fund or the value of the assets thereof."

The "Handbook on Common Trust Funds" was published by the Trust Division in 1939. Our committee is now considering a revision and republication of this handbook.

After several months of intensive work, in co-operation with Gilbert T. Stephenson, the Committee on Intermediate Court Accounting submitted its report containing the following underlying objectives of intermediate court accounting: (1) protection of the rights of all interested parties; (2) preservation of the confidential nature of trust relationships; (3) simplicity; (4) economy, and (5) conclusiveness of accounting as to all matters and parties properly before the court.

This report was published in the March, 1945 issue of the "Trust Bulletin." In Indiana a bill, based on this report, was passed by the legislature, following repeal of the Uniform Trustees Accounting Act. The new act provides more practical accounting rules and procedure for all trustees under wills, deeds, and agreements, in line with the recommendations of the committee.

The Committee on Corporate Trust Activities is making a survey of the experience of trust institutions in administering corporate trusts under the Trust Indenture Act of 1939. It has requested 92 trust institutions, known to have qualified with the Securities and Exchange Commission as trustee under certain indentures subject to the act, to make suggestions as to any provisions of the act in the interests of better protection to the bondholders or to facilitate the duties of the trustee.

With only one or two exceptions, the Committee on Relations with the Bar has reported generally satisfactory relations with the bar over the country. Informal meetings have been held with the chairman of the committee on unauthorized practice of the law of the American Bar Association and several situations have been resolved satisfactorily.

In Louisville, Kentucky, court action was started by the bar association there against the local trust institutions. However, this case has not been heard and efforts are still being made to bring about a settlement.

The Committee on Trust Education is co-operating with the American Institute of Banking in revising Volume II of the A.I.B. textbook "Trust Business." Individual chapters have been assigned to trustmen specially qualified in the subject for editing or rewriting. Plans calls for the revision of the entire manuscript by January 1, 1946. The revision of Volume I was completed last fall.

The organization of life insurance and trust councils throughout the country is proceeding steadily and is productive of mutual understanding and education and increased business for members of both groups. For new councils have been organized during the past year: the first in Cincinnati, Ohio, last December; the second in Detroit, Michigan, in February; the third in Charlotte, North Carolina, in June, and the fourth in Dallas, Texas, also in June. This brings the total number of councils organized to 27. There are several other cities where councils are under contemplation, particularly Omaha, Nebraska, and Houston, Texas.

Since most of today's trust business is handled in departments of commercial banks or affiliated institutions, it is natural that the commercial customers of the institution constitute the best source for its trust business. For this reason the degree

of cooperation between commercial banking officers, directors, and the trust department has always been important in the development of trust business.

Several months ago, the Trust Division's Committee on Trust Information started a study to find out the most effective methods of cooperation currently in use. This committee prepared a comprehensive questionnaire and mailed it to a representative cross section of 419 Trust Division members. Answers were received from 193 institutions and their replies were incorporated in an enlightening report with recommendations published in the May "Trust Bulletin." The committee is now at work on a project designed to obtain nationally, and on a uniform basis, important probate court statistics from representative jurisdictions throughout the country.

Last year, under the administration of Henry A. Theis, the Committee on Trust Investments prepared a most significant and helpful investment study on investment procedure, policy, and situation of investments. Praise for this report, which was published in the "Trust Bulletin" of October 1943, came from trustmen, especially in the smaller institutions, from all parts of the country. Last November, again under the able chairmanship of Donald C. Miller of Chicago, the committee compiled a composite reference list of trust investment securities, made up from the individual lists of 59 representative trust institutions, and a confidential copy was sent to every member of the division. This committee, now at work on another project, scheduled for completion this fall, will report the opinion of a representative cross section of carefully selected trust investment men over the country regarding some trust investment problems.

During 1945, 44 state legislatures have been in session. Because of this the Committee on Fiduciary Legislation has had a very busy and very productive year. Last December it compiled a chart of important trust legislation for every state and copies were sent to the Trust Division membership. In June a compilation of new legislation affecting trusts and estates was made and published in the "Trust Bulletin."

A total of 14 measures recommended by the Trust Division Committee on Fiduciary Legislation was adopted by 27 states, with a total of 37 trust legislative enactments. In addition, 14 states provided for the probate of servicemen's wills, 14 enacted laws as to the administration of missing persons' estates, and 18 legalized acknowledgment of instruments before any commisisoned officers of the armed forces.

These are only a few of the many problems engaging the attention of our 15 active committees. We are also studying the probable effects on the trust business of unionization of employees, the small unprofitable trust department, the best means of handling small trusts, postwar public opinion surveys, and service to returning veterans.

As most of you know, we canceled our annual Mid-Winter Trust Conference promptly following the request of War Mobilization Director Byrnes that all conferences and conventions be called off. This action was appreciated because I received a letter from Colonel J. Monroe Johnson, director of the O.D.T. in which he said: "I congratulate the Trust Division of the American Bankers Association on the prompt and whole-hearted cooperation shown in the voluntary cancelation of their mid-winter meeting in New York. Such action taken in a patriotic spirit furnished a noteworthy example to other organizations in this hour of stress." We had a fine program planned for this conference even though it was canceled. We went ahead with our "Conference in Print" and it met with enthusiastic response of trustmen over the country.

Last fall we held one of our best Mid-Continent Trust Conferences in Chicago, with the splendid cooperation of the Chicago Corporate Fiduciaries Association.

So far I have reported to you briefly on some of the technical work done in the division. There was a time when the trust business and trustmen were pretty much "business isolationists." In former days we could work pretty much by ourselves on our own problems oblivious to happenings in the outside world, and still do a pretty good job for our institutions and our customers. But those days are gone. Today the trustman's horizon must be greater. Today the broadening obligations of trusteeship require us to keep informed on social, economic, and political developments which have and will have a vital influence on our business.

In the final analysis the future of our business will be measured by the quality of our leadership and personnel. In closing this report, I want to pay high tribute to the chairmen and members of all Trust Division committees, and especially to Jim Allison and Evans Woollen and members of the Executive Committee for their real work and loyal support which made possible our accomplishments for the year. In addition, I want to thank Merle Selecman and his entire Trust Division staff for the efficiency and understanding they have brought to all of our activities. I know that your officers for the coming year will have the same full cooperation and wise counsel that has been accorded me during my administration.

BANKING LAW ARTICLES

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Certification of Check Withdraws Sum Thereof from Control of Drawer—Service On Holder of Check Necessary to Validate Attachment

Where a check is certified by a bank at the request of a depositor—drawer, it creates and constitutes a debt evidenced by a negotiable instrument and the obligation of the certifying bank is upon the instrument; and such debt can only be validly attached by the service of a certified copy of the warrant upon the holder of the instrument itself. This was decided in the case of Feingold v. Ornoff, Supreme Court, 57 N. Y. Supp. (2d) 68.

Plaintiff sought an order restraining defendant, payee of a certified check issued by the plaintiff, from further negotiating the check and further restraining the defendant bank from paying the check. Personal service was made on defendant bank and by registered air mail on defendant payee. Defendant payee appeared specially for purpose of objecting to the power of the court to act upon the ground that no jurisdiction was ever obtained by service of process personally on defendant payee within the state of New York; and that no jurisdiction was obtained by service by air mail on defendant payee and that no attachment was ever issued or levied upon in New York. Plaintiff contended that the check, being certified, the money represented thereby was set aside by defendant bank and constituted a fund within the state.

It was held that the check being certified, was deemed to be charged to the account of the plaintiff, and the sum thus charged remained as a deposit to the credit of the check, and

NOTE—For similar decisions see B. L. J. Digest (Fifth Edition) § 249.

was withdrawn from the control of the plaintiff except as a holder of the check. Thereafter the plaintiff could not check against or draw out the funds in the bank necessary to meet the check. The plaintiff no longer had any rights to this particular fund. No fund existed in New York which could be held to constitute property. The defendant payee was a necessary party and he was not properly before the court.

The Court, in its opinion, stated:

Plaintiffs have moved for an order enjoining and restraining defendant Ornoff and any and all persons to whom said defendant may have assigned, transferred and negotiated a certified check made by plaintiffs to said defendant for the sum of $3,006, from further negotiating, depositing or cashing the said check and further restraining defendant Manufacturers Trust Company from paying said check.

The order to show cause upon which this motion is made was served personally on the Manufacturers Trust Company and by registered air mail on defendant Ornoff. Defendant Manufacturers Trust Company has neither appeared nor opposed the application. Defendant Ornoff appeared specially for the purpose of objecting to the power of the court to act upon the ground that no jurisdiction has ever been obtained by the service of process personally upon said defendant within this state; that no jurisdiction was obtained by the service of the order to show cause in the manner stated and that no attachment has ever been issued or levied within this state.

In Ebsary Gypsum Co. v. Ruby et al., 256 N. Y. 406 at page 410, 176 N. E. 820, at page 821, it was held: "If the owners refuse to appear and choose to suffer a default, the court will be powerless by any effective judgment to compel them to make delivery of the necessary documents. It cannot compel them to set their hands to the documents under penalty of contempt, for contempt there can be none in the absence of jurisdiction of the person. It cannot direct the execution of the documents by the sheriff or a master, for the direction will be brutum fulmen without the presence of the res, the subject of the transfer. Garfein v. McInnis, 248 N. Y. 261, 162, N. E. 73; Deschenes v. Tallman, 248 N. Y. 33, 37, 161 N. E. 321 [322]. 'The court, not having jurisdiction of the res, cannot affect it by its decree, nor by a deed made by the master in accordance with the decree.' Fall v. Eastin, 215 U. S. 1, 11, 30 S. Ct. 3, 7, 54 L. Ed. 65, 23 L. R. A., N. S., 924, 17 Ann. Cas. 853; Deschenes v. Tallman, supra; American Law Inst., Restatement, Conflict of Laws, §§ 55, 111."

Plaintiff urges that the check having been certified, the money was thereby set aside by the Manufacturers Trust Company and constitutes a fund within this state.

In Standard Factors Corporation v. Manufacturers Trust Co., 182 Misc. 701, 704, 50 N. Y. S. 2d 10, 12, it is said:

". . . upon certification of the check the obligation of the defendant, as certifying bank, was solely upon the check, so long as it remained outstanding whether the check was certified at the request of the drawer or any one else and regardless of whether it was still held by the drawer or had been delivered to a payee or other transferee, that the drawer who procures the certification of a check is entitled to payment, not as a depositor entitled to repayment, but as the holder of a certified check. In other words, that the obligation of the bank to a depositor is upon the check, and not upon an open account, and hence the only manner in which attachment and levy could be effectively made in the circumstances shown was to levy upon the instrument itself, i. e., upon the certified check, as prescribed by sections 916 and 917 of the Civil Practice Act.

"Section 916 provides that debts arising upon a negotiable instrument for the payment of money are subject to attachment by levying upon the instrument, if it belongs to the defendant, and is found within the county; section 917 provides that where the property consists of a debt represented by a negotiable instrument for the payment of money the levy must be made by leaving a certified copy of the warrant of attachment with the person holding the same. Here, admittedly, the defendant was not the holder of the certified check when, on November 10, the certified copy of the warrant of attachment was served upon it, as that instrument only came into its possession three days later, on the 13th."

182 Misc. at page 706, 50 N. Y. S. 2d at page 14: ". . . a certified check stands on a totally different footing. As stated in 5 Ruling Case Law, section 48, page 528: 'When a check is certified, it is deemed to be charged to the account of the drawer, and the sum thus charged remains as a deposit to the credit of the check, and is withdrawn from the control of the drawer except as a holder of the check. Thereafter he cannot check against or draw out of the funds in the bank necessary to meet the check; these funds are no longer his.' "

182 Misc. at page 707, 50 N. Y. S. 2d at page 14:

"Hence, in the case at bar, upon the certification of the check, eo instante, the sum appropriated from the credit of the drawer thereupon stood as a sum to the credit of the certified check; the relationship of bank and depositor assumed a different form; the bank's obligation to its depositor was transmogrified from one on open account to an obligation upon the check, no matter at whose instance the certification was procured.

"Upon such a state of facts, where a check is certified by a bank at the request of a depositor-drawer, it creates and constitutes a debt

evidenced by a negotiable instrument and the obligation of the certifying bank is upon the instrument; and such debt can only be validly attached by the service of a certified copy of the warrant upon the holder of the instrument itself."

It necessarily follows, therefore, that no fund exists in this state which can be held to constitute a res. Defendant Ornoff is a necessary party; he is not properly before the court. The court is therefore, without power to render any effective decree.

The motion is denied.

State Statute Providing for Escheat of Abandoned Bank Deposits Held Valid and Constitutional and Applicable to Deposits in National Bank

A state statute providing for the escheat (reversion of property to state upon failure of heirs) to the state of bank deposits which have not been dealt with for a period of 20 years either by additions thereto or withdrawals therefrom, and have been abandoned by the persons who have left said funds on deposit, is valid and constitutional, and it rightfully includes national banks. The procedural steps required by the act for its enforcement constitute due process and the six year statute of limitations is not available to the depository bank as to any banking credits involved in the present litigation wherein a declaratory judgment is sought to determine the validity of the act authorizing escheat to the state of abandoned bank deposits.

A national bank is subject to laws of the state wherein it has its principal office and place of business, particularly so, where the impounded accounts have been reached by attachment. The fact that depositor's accounts are in a national bank do not render deposits immune to attachment or other appropriate proceedings to reach the same if and where authorized by state law.

A deposit is a chose in action, and when made, becomes part of mass of property within the state whose transfer and devolution is subject to state control. The state statute governing

NOTE—For similar decisions see B. L. J. Digest (Fifth Edition) § 465.

escheat of such abandoned bank deposits does not purport to do more than any other regulation of devolution of bank accounts of missing or unknown persons, it is held to be a function clearly within the state's competence. The statute does not confiscate property or property rights; it does not alter contracts of deposits; and there are not unusual or harsh means permitted or employed in its enforcement. In the instant cases wherein enforcement of statute is sought, there has been a judicial determination of depositors' abandonment of their deposits. This was decided in the case of State v. Northwestern National Bank of Minneapolis, Supreme Court of Minnesota, 18 N. W. Rep. (2d) 569.

The court, in its opinion, stated:

Appeal from District Court, Ramsey County; James C. Michael Judge.

Actions, tried together, by the State against the Northwestern National Bank of Minneapolis for a declaratory judgment determining the validity of the act authorizing escheat to the state of abandoned bank deposits, application thereof to defendant, and plaintiff's right to establish and enforce its rights in and to the funds on deposit, and against George C. Aldons and others, depositors, to recover the amount of certain checking and savings accounts, cashier's check and a certificate of deposit, in which the bank intervened. From a judgment for plaintiff in part and for the bank in part, both parties appeal.

Affirmed on the bank's appeal, and reversed on plaintiff's appeal.

J. A. A. Burnquist, Atty. Gen., and William C. Green, Asst. Atty. Gen., for the State.

Faegre & Benson and Armin M. Johnson, all of Minneapolis, for Northwestern Nat. Bank.

JULIUS J. OLSON, Justice.

We have cross-appeals in two cases, both tried together below and consolidated here. The vital issue common to both cases is whether L.1943, c. 620, is a constitutionally valid enactment.

We shall first consider the issues presented in State v. Northwestern National Bank. There the state, by action for a declaratory judgment, sought to have the cited act determined to be a valid enactment; that defendant is subject to all its provisions; that the state "is entitled to establish and enforce its rights in and to the funds and other property" described in its complaint which will, under the provisions of the act, "escheat to and become the property of" the state "by reason of

the abandonment thereof" by its original owner. Paragraph II of the state's complaint alleged:

"That said defendant held on deposit and otherwise on June 30, 1943, funds and other property, and increase and proceeds thereof, which had been left with it on deposit and otherwise and had not been dealt with for a period of twenty (20) years by additions thereto, withdrawals therefrom, or the assertion of any claim thereto and had been abandoned by the persons who had left said funds and other property on deposit and otherwise with defendant; . . ."

The bank's answer admitted its corporate existence as a national bank and that there was an actual and justiciable controversy between the parties in respect to the constitutionality of the act as applied to it. In the fourth paragraph thereof the bank alleged:

"Answering paragraph II of said complaint, defendant denies the allegations thereof but alleges that on June 30, 1943, it was indebted to certain individuals, partnerships and corporations, including residents of the State . . . and nonresidents" thereof, "which indebtedness was evidenced in part by credit balances in commercial or savings accounts, in part by negotiable certificates of deposit, and in part by outstanding negotiable cashier's checks, which said indebtedness had not been dealt with by the owners thereof, by additions thereto or withdrawals therefrom for a period of twenty (20) years preceding said June 30, 1943."

In the companion case of State v. Aldons, the state sought judgment against defendant depositors (13 in number), all of whom are the bank's creditors in various forms of credit such as checking and savings accounts, a cashier's check, and a certificate of deposit. All causes relate to deposits made prior to June 30, 1923, and as to each, separately, a cause of action was pleaded. Jurisdiction was obtained by means of attachment of each depositor's credit in the bank and by publication of process with notice to unknown claimants. The bank intervened on the ground that it had "an interest in the outcome" in each and all of these actions "of such a nature that it may suffer a loss by the direct, legal effect of any judgment entered for plaintiff."

Intervener, in the fourth paragraph of its complaint in intervention, stated that as to the first eleven causes the named defendants had "from time to time prior to June 30, 1923, deposited with" it the amounts alleged by the state "in said causes of action, by reason of which complainant in intervention is now indebted to said named defendants," and that "said defendants have not dealt with said indebtedness . . . by making additions thereto or withdrawals therefrom" since June 30, 1923. It averred lack of knowledge or information sufficient to form a belief as to whether "said defendants have abandoned said indebtedness and therefore denies that said indebtedness has

been abandoned." As to the two remaining defendants, Bruno and Larson, it alleged that Bruno, on May 21, 1917, acquired from the bank's predecessor "a negotiable certificate of deposit for $495," which has ever since "remained outstanding, and by reason thereof" it "is now indebted to said defendant." But, in avoidance, it denied liability, because, as to whoever may now be the owner of the certificate, the statute of limitations has run against the owner's claim. It has cited and relies upon Minn. St. 1941. § 541.05, Mason St. 1927, § 9191. As to Larson, it alleged that on April 15, 1910, a negotiable cashier's check for $6.98 was issued to him and that at all times since the check has "remained outstanding and by reason thereof" it "is now indebted to said defendant," but, in avoidance, it pleads the six-year statute of limitations above referred to.

In this, as in the other action, the bank asserted its claim of unconstitutionality of the act as applied to national banks. That the procedural steps taken are in conformity with all directions and requirements of the act is not questioned.

The trial court was of opinion, and so found, that the act "is valid; that it rightfully includes national banks; and that the procedural steps required by the Act for its enforcement constitute due process of law." It found for the state on all issues, except that as to defendant Bruno it sustained intervener's claim that the statute of limitations was a good defense, basing its conclusion upon our decision in Mitchell v. Easton, 37 Minn. 335, N.W. 910. In respect to defendant Larson's cashier's check, the court was of opinion that—"in view of the weight of more recent decisions, I do not feel it necessary to extend the rule of the Mitchell case beyond the exact question decided by it. Or, in other words, I do not feel compelled to extend the reasoning of that decision by analogy to either cashier's checks or certified checks."

Judgment was entered upon these findings and both parties have appealed. The bank assails the validity of the entire act but does not object to the court's findings as to the holder of the certificate of deposit. It is from that part that the state has appealed.

We have stated the issues pleaded, except those upon which the bank places reliance in both cases to support its theory that the act as to it is wholly void on constitutional grounds. Its contentions are set forth as follows:

(1) Since intervener is a national bank, it is by reason thereof "an instrumentality of the Government, and to enforce the act as to it would be an improper and unwarranted interference" with its functions as such instrumentality, and that the act "restrains and impedes" the national government in the exercise of its power under U.S.Const. art. I, § 8.

(2) "It purports to authorize this court to declare the escheat" of deposits "owing by complainant" to its depositors; that "to the extent said indebtedness has been or is owned by natural persons, plaintiff is not required to prove that such persons are dead"; that "to the extent that said indebtedness has been or is owned by corporations or other artificial persons, the existence of any such owners continues until" terminated by "law other than" c. 620, "and the property of such owners does not pass to the State by escheat."

(3) "It purports to authorize the court" to "transfer" to the state the ownership of money "owing by complainant" to its depositors; that the act "fails to provide any adequate notice" to them "of the commencement of this action" and fails to afford them adequate "opportunity to be heard." As to its certificate of deposit to Bruno and its cashier's check to Larson, "owing by complainant," that although these "may have been negotiated to a holder in due course or to other transferee" now unknown, the act does not provide adequately for notice to such holder or transferee "of the commencement of this action or any opportunity" to be heard. Therefore, it is said, these creditors will be deprived "of their property without due process of law." Minn. Const. art. 1, § 7, and U.S.Const. Amend. XIV.

(4) Lastly, the act is void "because it purports to authorize the court in this proceeding to transfer to plaintiff the ownership of indebtedness owing by complainant * * * to defendants herein, but fails to provide that in the event of said transfer the obligation of complainant * * * to said defendants is discharged and said Chapter 620 and the enforcement thereof in this action are in violation of the rights of complainant * * * under the contract clause" of Minn.Const. art. 1, § 11, and U.S.Const. art. I, § 10, and "will subject the" bank "to loss without due process of law."

The state put in issue all these contentions. It is clear, therefore, that the constitutionality of the act is the important question here. While there are other questions involved, to be disposed of later, we shall go at once to that issue.

The procedure under our act, to accomplish its avowed purpose, follows closely the provisions of the California act, construed and sustained in Security Sav. Bank v. California, 263 U.S. 282, 44 S.Ct. 108, 68 L.Ed. 301, 31 A.L.R. 391, and the Wisconsin act, construed and sustained in State v. Marshall & Ilsley Bank, 234 Wis. 375, 291 N.W. 361. The principal distinction between our act and those to which we have referred is that under those acts both depositor and bank are made parties defendant. There jurisdiction is obtained of the res by personal service of process on the bank and by publication as to depositors and unknown persons. Under our act, only the depositors are made parties defendant, and as to them jurisdiction is obtained

of the res by attachment of the deposited fund still in the bank's possession. This must precede the service by publication of the summons with notice to unknown claimants (§ 5, subd. 3).

Only *abandoned* funds (§ 5) are involved. The state's theory is that insofar as the depository (bank or other financial institution) is concerned, its rights to such funds are no different from what they would be if the plaintiff were himself the depositor; or, if the plaintiff were a creditor of the depositor and proceeded by means of attachment or garnishment to satisfy his claim (§ 5, subd. 2) or have a levy made under execution after recovery of judgment (§ 5, subd. 7).

The action is brought in the name of the state, by its Attorney General. Only when he has become satisfied that reasonable grounds exist for the escheat of the deposit, "by reason of the abandonment thereof" by the original owner, is he authorized to bring the action (§ 5, subd. 1). Subdivision 3 provides for service of summons by publication for a period of four weeks. "With the summons," a notice must also be published, giving the title of the action and referring to the particular claim. This notice is "directed to all persons other than those named as defendants therein claiming any interest in any funds . . . described in the complaint, and requiring them to appear within 60 days after the first publication of the summons and show cause, . . . why such funds . . . have not escheated to and become the property of the state." A copy of the summons and notice must also be posted in "a conspicuous place" in each depository institution "within 15 days after the first publication of the summons" and "copies thereof mailed within the same period" to each defendant at his "last known place of residence or business." Any interested person may intervene in the action (§ 5, subd. 4). Only upon full compliance with all statutory requirements is the court given "full and complete jurisdiction over all the funds . . . and of everyone having or claiming" any interest therein (§ 5, subd. 5). When such proofs have been furnished, findings made, and judgment entered, the same may "be satisfied only out of the property attached" (§ 5, subd. 7). Section 7 provides: "Any person claiming to be legally entitled to any of the funds . . . who did not appear in said action, may, within a period of ten years after the entry of judgment therein, sue the state to recover the funds" so taken. And, "in case such person be an infant or under disability, the period of limitation is extended to one year from the removal of such disability." Provision is made for the repayment of the fund to the true owner out of the state's public treasury.

National banks are clearly within the terms of the act (§ 1, subd. 2). Only *abandoned* funds are involved (§ 2). There is a statutory rebuttable presumption created (§ 3) that when any person "has left on deposit" with any banking or financial institution funds not thereafter dealt with for a period of 20 years, without asserting any claim thereto

during that period, he "is presumed to have abandoned the same." Banks and financial institutions are required to file statements as to such abandoned funds with the secretary of state at stated times (§ 4, subd. 1[1]).

"A copy of each statement . . . with a notice, directed to whom it may concern, stating that the deposits or other property referred to in the statement have not been dealt with" for the statutory period, "and requesting all persons having knowledge or information relative to the whereabouts of the persons named in the statement, or other possible claimants to the funds . . . to give this information to the subscribing officer, shall be displayed in a prominent place in the banking institution or financial institution for which the statement is filed, accessible to the public, for a period of 30 days from the date of filing." Section 4, subd. 3.

Section 5 deals with escheated funds and prescribes the manner and means to be employed to reach the same and to have the property judicially adjudged escheated to the state. Other essential requirements to establish *abandonment* and to have *escheat* declared by judgment have been stated and need not be repeated.

The bank has assumed the championship of the rights of its—shall we say—dormant depositors, coupling their rights with its own. Its attack is founded upon the theory that the provisions of our act as to notice to them and their opportunity to be heard are so defective and inefficient in its requirements as to deprive them of a reasonable opportunity to be heard; hence that the bank has no protection if it were to respond to the state's demand for payment of their alleged *abandoned* deposits.

Our statute is strikingly similar to that of Wisconsin, as quoted, discussed, construed, and sustained in State v. Marshall & Ilsley Bank, 234 Wis. 375, 377, 291 N. W. 361, 362, supra. There the bank's defenses were predicated upon the ground of lack of "due process as to deposits" and, as to both depositor and bank, there was impairment of contract obligations. The Wisconsin court sustained the act largely upon authority of Security Sav. Bank v. California, 263 U. S. 282, 44 S. Ct. 108, 68 L. Ed. 301, 31 A. L. R. 391, supra.

In Anderson Nat. Bank v. Luckett, 321 U. S. 233, 64 S. Ct. 599, 88 L. Ed. 692, 151 A. L. R. 824, the court considered and construed a Kentucky statute, under the provisions of which that state had sought and obtained judgment against the bank under a statute which required every bank or trust company in the state to turn over to the state deposits which had remained inactive and unclaimed for specified periods. The act had been sustained in its entirety by the Court of Appeals of that state in Anderson Nat. Bank v. Reeves, 293 Ky. 735, 170 S. W. 2d 350. On remand, the trial court dismissed plaintiff's bill for an injunction to enforce the act. The Court of Appeals affirmed.

294 Ky. 674, 172 S. W. 2d 575. In that case also, the bank, assuming to act in its own behalf and in behalf of its depositors, asserted lack of due process and, as applied to deposits in national banks, that it conflicted with the national banking laws (R. S. § 5136, 12 U. S. C. A. § 24) and was an unconstitutional interference by the state with the bank's operations as a banking instrumentality of the United States.

1. As we have seen, we are dealing here with personal property *abandoned* by its owner. In the Luckett case, the court was of opinion that (321 U. S. 240, 64 S. Ct. 603, 88 L. Ed. 692, 151 A. L. R. 824): ". . . At common law, abandoned personal property was not the subject of escheat, but was subject only to the right of appropriation by the sovereign as bona vacantia. . . . Like rights of appropriation, except so far as limited by state law and the Fourteenth Amendment, exist in the several states of the United States." (Citing cases.)

Viewing the present act broadly and, for the moment, eliminating the rights and privileges of national banks, we have the single question of whether, in the circumstances here shown, the state may compel surrender to it of deposit balances where there is substantial ground for belief that they have been abandoned or forgotten. Under our act, the state in acquiring such deposits holds them subject to all lawful demands of the true owner (c. 620, § 7). Not only must such deposits have remained dormant and unclaimed over a period of at least 20 years before the state may take them, but, in addition, if the true owner appears within 10 years after entry of judgment, the state is required to repay him every dollar it has taken from him.

2. Obviously, all these deposits created a debtor-creditor relationship between the bank and its depositors. The contracts so made were incurred and to be performed in the state where the bank was located and thereby became (321 U. S. 241, 64 S. Ct. 603, 88 L. Ed. 692, 151 A. L. R. 824) "subject to the state's dominion."

". . . And it is within the constitutional power of the state to protect the interests of depositors from the risks which attend long neglected accounts, by taking them into custody when they have been inactive so long as to be presumptively abandoned, . . . just as it may provide for the administration of the property of a missing person." (Citing cases.) Cf. Germantown Trust Co. v. Powell, 265 Pa. 71, 83, 108 A. 441, 445.

The bank, as we have seen, does not question its original obligations to its depositors. And it is equally clear that when it is required to pay these funds to the state treasurer, if our act is a valid one, its obligation to the depositor is gone just as effectively as if the bank had been compelled to pay any attaching or garnishing creditor of the depositor.

3. Our next inquiry, therefore, is to determine (321 U. S. 243, 64 S. Ct. 604, 88 L. Ed. 692, 151 A. L. R. 824) "whether the procedure by which the state undertakes to acquire the depositors' right to demand payment of the deposits was upon adequate notice to them and

opportunity for them to be heard." The facts we have recited clearly demonstrate that here, as in the Luckett case (321 U. S. 245, 64 S. Ct. 605, 88 L. Ed. 692, 151 A. L. R. 824): ". . . The statutory procedure, so far as it affects depositors, is in the nature of a proceeding in rem, in the course of which property, against which a claim is asserted, is seized or sequestered, and held subject to the appearance and presentation of claims by all those who assert an adverse interest in it. In all such proceedings the seizure of the property is in itself a form of notice of the claim asserted, to those who may claim an interest in the property." Due process, as measured by and sustained in Security Sav. Bank v. California, 263 U. S. 282, 44 S. Ct. 108, 68 L. Ed. 301, 31 A. L. R. 391, supra, and in the Luckett case, supra, cannot be said to be wanting under our act.

4. In First Trust Co. v. Matheson, 187 Minn. 468, 472, 246 N. W. 1, 2, 87 A. L. R. 478, 481, annotation at page 485, at seq., the question was whether our court had the "means for exercising jurisdiction" in a case where the situs of the property involved was here but defendant beneficiaries were residents of California. Plaintiff brought the action as trustee of an express trust to have the validity of the trust established; and subject thereto, to quiet title in it of the trust property. We there held: ". . . With us, as in most states, substantive law is implemented with the procedural device of substituted service. Service of summons may be by publication or personally without the state in the cases enumerated in [G. S. 1923 (2 Mason, 1927) § 9235]. One of them (subdivision 5) is 'when the subject of the action is real or personal property within the state, in or upon which the defendant has or claims a lien or interest, or the relief demanded consists wholly or partly in excluding him from any such interest or lien.' Explicitly providing for the exercise of jurisdiction over personal property, there is no room for negative or restricted interpretation. There is a similar act of Congress, section 57 of the Judicial Code (28 U. S. C. A., § 118), providing that the United States District Courts may proceed in rem or quasi in rem by substituted service, personal, 'if practicable,' and, if not, then by publication. There is no longer question of the validity of such laws and the right they give to act, not on or against persons, but solely on or in respect to personal as well as real property and upon or against the interests of persons having or claiming such property or some right therein." (Citing cases.)

5. Next to be considered is the bank's contention that our statute infringes the national banking laws and unconstitutionally interferes with it as an instrumentality of the national government. As to this phase, we have found nothing in the act discriminatory against national banks. The act simply directs payment to the state by all banks, state and national alike, of what are presumptively *abandoned* deposits. Nor do we find any word in the national banking laws, either expressly

or by implication, conflicting with the provisions of our statute. As was held in the Luckett case, 321 U. S. 248, 64 S. Ct. 607, 88 L. Ed. 692, 151 A. L. R. 824: "This Court has often pointed out that national banks are subject to state laws, unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions." And "the mere fact that the depositor's account is in a national bank does not render it immune to attachment by the creditors of the depositor, as authorized by state law."

6. As we have seen, a bank account is a chose in action of the depositor against the bank. In conformity with its contract, in accepting the deposit the bank is obligated to repay the amount thereof in accordance with its terms. Thereby the deposit becomes (321 U. S. 248, 64 S. Ct. 607, 88 L. Ed. 692, 151 A. L. R. 824)—"a part of the mass of property within the state whose transfer and devolution is subject to state control." And "It has never been suggested that nondiscriminatory laws of this type are so burdensome as to be inapplicable to the accounts of depositors in national banks.

"The statute here attacked does not purport to do more than does any other regulation of the devolution of bank accounts of missing persons, a function which is, as we have seen, within the competence of the state." We think the particular power here asserted by the state is not a forbidden encroachment upon the rights and privileges of appellant bank.

7. The bank, of course, relies upon First Nat. Bank v. California, 262 U. S. 366, 43 S. Ct. 602, 67 L. Ed. 1030, later followed in National City Bank v. Philippine Islands, 302 U. S. 651, 58 S. Ct. 269, 82 L. Ed. 504. It is to be noted, however, that in the First National Bank case the decision did not rest on any want of power of a state to demand of a national bank payment of deposits which the state was lawfully entitled to receive. Decision there turned rather upon the effect of the state statute in *altering the contracts of deposit* in a manner considered *so unusual and so harsh* in its application to depositors *as to deter them from placing or keeping their funds in national banks.* That case was carefully considered and distinguished in the Luckett case, supra. As there pointed out (321 U. S. 251, 64 S. Ct. 608, 88 L. Ed. 692, 151 A. L. R. 824): "The unusual alteration of depositors' accounts to which the Court referred was plainly the statutory declaration of escheat of depositors' accounts merely because of their dormancy for the specified period, *without any determination of abandonment in fact.* This it treated as in effect '*confiscation*' of depositors' accounts, operating as an effective deterrent to depositors' placing their funds in national banks doing business within the state." (Italics supplied.)

Our law specifically provides that there must be *abandonment* of the deposited property by its owner. The statutory presumption (c. 620, § 3) comes into play and is applicable to such situations as we

have in the instant case. Of course, the presumption is rebuttable. But we think, absent any contrary showing or any adverse inference to be drawn from the particular circumstances appearing, that the presumption applies. Even without the presumption, we think the evidence in the record is such as to raise a persuasive inference that there has been actual abandonment. The trial court in its findings (Record par. V, pp. 48 to 52) carefully reviewed the record and discussed all of appellant's claims. It was of the view that (Record, par. II, p. 46), since the bank had held these deposits over a period of more than 20 years prior to June 30, 1943, during all of which time the deposited funds "had not been dealt with . . . or the assertion of any claim" thereto made, therefore the fund had been abandoned by the persons who had left said funds . . . with defendant" bank. Abandonment being an issue of fact, its determination by the trier thereof settles that issue.

We have in this case no *alteration* of the contracts of the depositors, no *confiscation* of property or property rights, and no *harshness* in the treatment of either depositor or depository. And, as we held in First Trust Co. v. Matheson, 187 Minn. 472, 246 N. W. 2, 87 A. L. R. 481, supra: ". . . There is no longer question of the validity of such laws [substituted service of process] and the right they give to act, not on or against persons, but solely on or in respect to personal as well as real property and upon or against the interests of persons having or claiming such property or some right therein."

8-9. The bank also asserts that it has a valid defense under our statute of limitations against the claims here presented in the form of a cashier's check, a certified check, and a certificate of deposit. The statute relied upon is Minn. St. 1941, § 541-05, Mason St. 1927, § 9191, which reads:

"The following actions shall be commenced within six years:

"(1) Upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed." As to a cashier's check, its position is that this is the bank's own obligation, customarily issued by the bank's cashier at the request of the depositor against whose account it is charged, citing in support 5 Michie, Banks and Banking, § 251, and Dean v. Iowa-Des Moines Nat. Bank & Trust Co., 227 Iowa 1239, 281 N. W. 714, 128 A. L. R. 137. In that case a reargument was ordered and had. 227 Iowa 1240, 290 N. W. 664, 128 A. L. R. 137. Only count I of plaintiff's petition was so reargued. The question there was whether the statute of limitations had run against a bank draft issued by defendant in 1918 but not presented to the drawee until August 1937. The Iowa statute of limitations limited causes founded upon written contracts to ten years after the cause "accrues." Defendant's demurrer was sustained and upon appeal affirmed. Upon reargument the same result was reached, four justices

dissenting, because (227 Iowa 1246, 290 N. W. 667, 128 A. L. R. 143) —"when the appellee bank issued its draft, its agreement or undertaking was complete. It agreed to pay the draft if it was not paid upon due presentation." And since "The sole and only person that could make due presentation was the appellant," therefore, upon the "undisputed evidence . . . that no demand or presentment was made for more than nineteen years," the statute had run and constituted a valid defense.

Four causes of action were involved in that case. We have disposed of the first. The second cause was founded upon a cashier's check dated November 13, 1920, but not presented for payment until August 11, 1937. Defendant's demurrer to the complaint on the ground that the statute of limitations had run was sustained by the trial court, and the Supreme Court affirmed for the reason that the bank's liability was created from and after its issuance of the instrument, and that thereafter its duty was to pay it, there being nothing on the face of the instrument that the parties intended it to be possessed of the characteristics of a certificate of deposit.

The third cause was upon a certificate of deposit issued November 1, 1905. Not until August 28, 1937, was it presented for payment. The trial court overruled defendant's demurrer. The Supreme Court sustained that ruling, saying, in substance, that the statute of limitations does not begin to run in favor of a bank on a negotiable certificate of deposit, payable on its return properly endorsed, until its presentment for payment, notwithstanding the provisions of N. I. L. § 70, Minn. St. 1941, § 335.27, Mason St. 1927, § 7113, that "presentment for payment is not necessary in order to charge the person primarily" liable.

The fourth count was founded upon a certified check dated May 5, 1919, certified the same day. It was not presented for payment until August 20, 1937. There, also, the statute of limitations was relied upon by defendant. The trial court sustained the demurrer but was reversed on appeal, the Supreme Court being of the view that the effect of the bank's certification of the check at the request of the holder was to create a new obligation on the part of the bank to the holder. It deemed that the authorities there cited sustained the rule that such a certified check "is not due until presentation for payment." 227 Iowa 1257, 281 N. W. 724. Numerous cases and text writers are there cited.

In respect to certified checks, the bank's position here is that such certification is equivalent to acceptance by the bank, and, when such certification is made, the drawer as well as the endorsers are discharged and only the certifying bank remains the party liable on the instrument. It cites and relies upon §§ 335.741, 335.742, and 335.27 (§§ 7230, 7231, 7113), claiming that, since such certified check is a demand instrument, the contract represented thereby falls within the provisions

of § 541.05 (§ 9191). It relies in support thereof on Weaver v. Harrell, 115 W. Va. 409, 412, 176 S. E. 608, 609. It will be noted, however, that the basis for that opinion was West Virginia's legislative amendment to its N. I. L. § 70, Code 1931, 46-6-1, as follows: ". . . 'The statute of limitations shall not begin to run against the holder of a certificate of deposit or a bank note until after presentment and demand for payment.' . . . The failure of the Legislature to include certified checks in the exception to section 70 must be taken as conclusive of the legislative will that the statute of limitations should run against the holder of a certified check in favor of the bank from the date of certification."

In respect to the certificate of deposit here, the bank maintains that the trial court was right in holding that the statute of limitations presents a good defense. It is of the view that Mitchell v. Easton, 37 Minn. 335, 33 N. W. 910, is directly in point, and, since that case has never since been questioned or its legal effect in any way limited, therefore it is the law of this state and if any change is to be made it must be through legislative processes.

The act (§ 1, subd. 6) upon which these cases depend states that the word "deposit" and the phrase "funds or other property," as there used,—"means the unpaid balance of money or its equivalent received by a banking institution or financial institution in the usual course of business and for which it has given or is obligated to give credit to a commercial, checking, savings, time or thrift account, or which is evidenced by its certificate of deposit, passbook, share certificate, certificate of indebtedness, or other like certificate."

It is true, as claimed by the bank, that the Mitchell case stands unreversed. True, also, it has been cited in many later cases, but in reviewing these we find that they relate to cases involving only promissory notes. In no other case brought before us has a certificate of deposit been subjected to the defense of the statute of limitations. The question here, therefore is whether a negotiable certificate of deposit of the type here shown is to be classified as a *promissory note* or as *a deposit*.

The general rule, sustained by the great weight of authority in this country, is that such statute does not begin to run against an action upon such certificate where, as here, it is issued by a bank, payable on demand or on return of the certificate properly endorsed, until a demand for its payment is actually made. The cases sustaining that view are annotated in 23 A. L. R. 7, and a later annotation is found in 128 A. L. R. 157. In the author's note we find this: "The later cases support the majority rule stated in the original annotation that in the case of a certificate of deposit payable on demand or on return of the certificate properly indorsed, the statute of limitations does not begin to run against an action upon the certificate until a demand is made for

the payment thereof." Sustaining that rule, cases are cited from Illinois, Iowa, Maryland, Missouri, Nebraska, New Mexico, New York, Ohio, Pennsylvania, South Dakota, and Utah. The cases cited in the notes sustain the author's text.

Furthermore, we have the authority of Security Sav. Bank v. California, 263 U. S. 282, 286, 44 S. Ct. 108, 110, 68 L. Ed. 301, 306, 31 A. L .R. 391, 395, supra, where the court held: ". . . The contract of deposit does not give the banks a tontine right to retain the money in the event that it is not called for by the depositor. It gives the bank merely the right to use the depositor's money until called for by him or some other person duly authorized," And "It is no concern of the bank's whether the state receives the money merely as depository or takes it as an escheat." And that, too, was the holding of the court in State v. Marshall & Ilsley Bank, 234 Wis. 375, 379, 291 N. W. 361, 363, supra, where the court said: "The Bank urges in defense that the state statute of limitations had destroyed the claimant's right of action to recover the funds, and that therefore the funds were not 'on deposit or otherwise' when the statute went into effect. If our statute of limitations has destroyed the claimant's rights it is no affair of the Bank under the instant statute. The Bank's rights as against the State are not affected by it. . . . The Bank is not affected by the statute of limitations when it has no right to retain the money."

We therefore think the time has come to adopt the rule that a *deposit* is a transaction peculiar to the business of banking; that we should recognize a *certificate of deposit* to be exactly what on its face it purports to be, a *deposit* with the bank by the *depositor*, and not a promissory note, where the debtor must find the lender to meet his obligation. A "bank is not required to hunt up the depositor and pay him the money [it owes him], as an ordinary lender is bound to do with his creditor." 5 Zollman, Banks and Banking, Perm. ed., § 3154; McCormick v. Hopkins, 287 Ill. 66, 71, 122 N. E. 151, 153; Leach v. Beazley, 201 Iowa 337, 207 N. W. 374; Boyd v. Schneider, 7 Cir., 131 F. 223, 65 C. C. A. 209.

The reason assigned in the opposing cases is that such a certificate is in its character a demand note; hence the statute begins to run from its date. This is well illustrated in our own case of Mitchell v. Easton, 37 Minn. 335, 33 N. W. 910, supra, where the certificate read:

"Mower County Bank, Austin, Minn.,
March 29, 1876.

"L. S. Mitchell, Esq., has deposited in this bank seven hundred fifty and no-100 dollars, payable to the order of himself, in current bank notes, on the return of this certificate properly indorsed, with interest at the rate of ten per cent. per annum.

"Smith, Wilkins & Easton."

The bank was a copartnership. After the certificate was issued, Smith died and the remaining partners continued the business. In its decision, the court assigned as its reason for overturning the judgment for plaintiff rendered in the court below that (37 Minn. at page 337, 33 N. W. at page 911): "The defendants received the money of the plaintiff, and by the instrument sued on promised and agreed to repay it, with interest, and by placing their obligation in this form *they manifest an intention to change the character of the transaction from that of an ordinary deposit to that of a debt or loan evidenced by an instrument construed to be a promissory note payable on demand.*" (Italics supplied.)

We have examined the original record in that case and from it find that partial payments were made by defendants upon the instrument as follows: $75 on March 31, 1877; $100 April 10, 1877; and $93.03 May 4, 1878. It therefore seems rather clear that the parties in fact treated the instrument as a promissory note rather than "that of an ordinary deposit."

The Mitchell case has by almost unanimous consent been discredited and found to be out of line with the more modern concept that *bank deposits are not loans* in the ordinary sense, but rather and only banking "transactions peculiar in the banking business, which the courts recognize and deal with according to commercial usage and understanding." 5 Zollman, Banks and Banking, Perm. Ed., § 3154. Therefore, as an authority otherwise, it should be and is overruled.

10. The bank assigns as error in both cases the court's findings to the effect that the involved deposits had been *abandoned*. Of course, it is right in its claim that a mere presumption is not evidence. We have said so in many cases; but, while not evidence, it is a rule of law dictating decision on unopposed facts, and it shifts the burden of going forward with the evidence to the party claiming otherwise. Ryan v. Metropolitan Life Ins. Co., 206 Minn. 562, 289 N. W. 557. Our cases on this phase are found cited and annotated in 2 Dunnell, Dig. & Supp. § 3420.

As we have seen, there is no dispute concerning the bank's original obligations to its depositors. The only matter concerning which there can be said to be an issue is whether the statutory presumption (§ 3) is available and operative. We find in this case no opposing facts. Therefore, the bank's duty as the one bearing the burden to go forward with the evidence has not been met. No effort in that direction was made. On the contrary, the record discloses that ever since 1872 the bank has been operating extensively throughout a large area and in the most populous city of the state. It has been functioning and continues to function in competition with state banks, trust companies, and other financial institutions operating under state or national laws. In all

these years it has never, so far as the record discloses, denied meeting its obligations to its depositors in whatever form that relationship was evidenced. It has never heretofore sought shelter under the statute of limitations. During all these years it has used these funds to and for its own advantage. No interest has been paid, nor is any sought. All obligations presently involved are even now carried as valid and appropriate liabilities in the conduct of its banking business.

11. We conclude that L. 1943, c. 620, is a valid and constitutional enactment; that it rightfully includes national banks; that the procedural steps required by the act for its enforcement constitute due process; and that the six-year statute of limitations is not available to the bank as to any banking credits presently involved. On its appeal, there must be affirmance; on the state's appeal, a reversal.

So ordered.

Statutory Limitation on Bank's Liability to Depositors for Payment of Check Bearing Forged Indorsement of Payee

Under Section 43 of the Negotiable Instruments Law of New York, a depositor cannot recover from a bank that has paid checks which were properly drawn but upon which the payees' indorsement were forged, where the depositor does not notify the bank of the alleged forgeries until July 7, 1944, the checks being issued by depositor between March 13, 1941 and June 30, 1942, a period of more than two years without notification to the bank, as required by said section. The said section, however, is not retroactive and is not applicable to forged indorsements on checks issued prior to March 13, 1941, the effective date of said statute. Depositor has a vested right to have a six year period to discover the forgeries as to checks prior to March 13, 1941. This was decided in the case of Commander-Larabee Milling Co. v. Manufacturers and Traders Trust Co., District Court, W. D. New York, 61 Fed. Supp. 341.

The Court, in its opinion, stated:

This action is brought to recover the amount of numerous checks properly drawn by plaintiff, but upon which the payee's endorsement

NOTE—For similar decisions see B. L. J. Digest (Fifth Edition) § 1397.

was forged. We have previously considered this matter to some extent, and on April 9, 1945, we ordered plaintiff to serve a bill of particulars. 4 F. R. D. 296.

Defendant now moves under Rules 12 (b) and (f), Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, on the complaint and the bill of particulars for an order dismissing and striking out that portion of the complaint seeking to charge the defendant with liability for payment of the plaintiff's checks on which the endorsement of the payee was forged and which were issued by plaintiff (1) on and between March 13, 1941, and June 30, 1942, and (2) on such checks issued prior to March 13, 1941, because no cause of action is stated as to the forgeries within those periods covered and therefore they were irrelevant, immaterial and impertinent.

Defendant's motion is based on Section 43 of the Negotiable Instrument Law of the State of New York (c. 87 of the Laws of 1941, Consol. Law N. Y. c. 38), which reads:

"No national bank or banking organization as defined in the banking law shall be liable to a depositor for the payment by it of a check bearing a forged or unauthorized endorsement unless, within two years after the return to the depositor of the voucher of such payment, such depositor shall notify the bank that the check so paid bore such forged or unauthorized endorsement. § 2. This act shall take effect immediately."

The provisions of section 43 are not contained in the Uniform Negotiable Instruments Act, 5 Uniform Laws Annotated. Plaintiff first notified defendant of the alleged forgeries on July 7, 1944. The statute exonerates defendant from liability for any forged checks issued between March 13, 1941, and June 30, 1942, because the check vouchers admittedly had been in plaintiff's hands more than two years without any notification to defendant, as required by Section 43. Plaintiff in its brief concedes this portion of the motion, and as to this the motion is granted. (2) As to the second part of the motion, defendant claims exoneration because plaintiff received and held these check vouchers more than two years after the enactment of section 43, effective March 13, 1941, before notifying defendant that the payee's endorsement was forged. The sole issue is whether or not section 43 has any effect upon forged endorsements made prior to its effective date. Plaintiff claims to have a vested right to have a six-year period in which to discover the forgeries, and that section 43 is prospective and not retrospective. The six-year period of limitations was the only bar prior to the enactment of section 43. Defendant asserts that the section is analogous to a statute of limitation; that it relates only to a form of procedure or a mode of attaining rights; does not affect vested rights and that it was well within the power of the lawmaking body to limit the time for giving notice.

Under federal or state law the rule is that the lawmaking body may change laws relating to limitation of actions in pending cases. 1. McKinney's Consolidated Laws (N. Y.) Statutes, Section 59; Rexford v. Knight, 11 N. Y. 308; Lang v. Lutz, 180 N. Y. 254, 73 N. E. 24; Terry v. Anderson, 95 U. S. 628, 24 L. Ed. 365; Lamb v. Powder River Live Stock Co., 8 Cir., 132 F. 434, 67 L. R. A. 558; Gilbert v. Ackerman, 159 N. Y. 118, 53 N. E. 753, 45 L. R. A. 118; People v. Wendel, 217 N. Y. 260, 111 N. E. 846, Ann. Cas. 1916 B, 701. But all statutes must be construed as prospective unless the language of the act clearly indicates the intent that it be retrospective, and vested rights cannot be taken away.

"As a general rule a construction of a statute which will give it a retroactive operation is not favored by the courts. Thus it is said that all statutes are presumed to furnish a rule for future action only, and a law will not receive a retroactive construction unless its language, either expressly or by necessary implication, requires that it be so construed." McKinney's, supra, Sec. 51. The Rules of Statutory Construction as to retroactive operation of statutes are set forth in Sections 51-61, and they are construed by the numerous cases cited under these sections.

"A retroactive law is invalid when it is retrospective and attempts to take away or impair rights vested under existing laws . . . or when it creates a new obligation or attaches a new disability to transactions already past." Railroad Co-op. Building & Loan Ass'n. v. Boston Building Estates, 149 Misc. 349, 267 N. Y. S. 204, 206; Neild v. District of Columbia, 71 App. D. C. 306, 110 F. 2d 246. The rule in the federal courts is definitely stated in United States F. & G. Co. v. United States, 209 U. S. 306, 28 S. Ct. 537, 539, 52 L. Ed. 804, as follows: "The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." And again, in United States ex rel. Feuer v. Day, 2 Cir., 42 P. 2d 127, 128: "The courts refuse to give to statutes a retrospective operation whereby rights previously vested are injuriously affected unless compelled to do so by language which clearly requires it." Society for the Propagation of the Gospel v. Wheeler et al., Fed. Cas. No. 13,156, defines as retroactive a statute which attached a new disability in respect to "transactions . . . past . . . ."

It seems to me that the applicable rule is that stated in 14 A. L. R. page 710 (relating to an analogous statute) as: "As a general rule a statute requiring a condition precedent to an action against a municipality for personal injury that a notice shall be given of the accident

and a claim made by reason thereof within a limited time is not retroactive, and does not apply where the accident happened before the statute took affect." Numerous cases supporting this statement are there cited.

The only case interpreting Section 43 of the Negotiable Instruments Law is Bloch v. Schwartz, 266 App. Div. 188, 41 N. Y. S. 2d 837, 839. While in that case the demand for payment was made a little less than five months after Section 43 became law, but more than two years had passed since the return of the vouchers involved, the language of the court is most significant. The court clearly construes the statute as one of substantive law, and not as one to be taken retroactively. Stated the court: "The present statute does not in terms establish a statute of limitations. . . . In other words, it creates a condition to a claim of ultimate liability." In Shattuck v. Guardian Trust Co., 204 N. Y. 200, 97 N. E. 517, 520, where the corresponding Section 326 of the Negotiable Instruments Law was considered, the court said: "We regard this as one of those general statutes which promulgate rules of substantive law . . . ." Vide also: Pratt v. Union National Bank, 79 N. J. L. 117, 75 A. 313.

Section 43 does not by any expression make its application retroactive. No intent that it be retroactive can be clearly drawn from the language of the section. The statute creates a rule of substantive law. It is not a limitation statute nor is it to be construed as analogous to one, in so far as it affects vested rights of the plaintiff.

In accord with the foregoing it must be held that the defendant's motion as to checks prior to March 13, 1941, must be denied.

BANKING DECISIONS

In this department are published each month all of the important decisions of the Federal and State Courts involving questions pertaining to the law of banking and negotiable instruments. The experiences they disclose deserve careful attention and study of bankers, bank counsel, the depositor and the bank student seeking advancement.

Statute of Limitations Not Tolled Against United States As Holder in Due Course of Notes

United States v. Warshaw, District Court E. D. N. Y. 61 Fed. Supp. 678

A statute of limitations will run against the Government only when it assents upon conditions prescribed. The United States is not bound by a statute of limitations unless the Congress so provides.

Husband and wife, as makers, jointly executed and delivered a note to the order of a corporate payee, for the purchase of an oil burner. The note was thereafter assigned to a bank. Subsequently makers defaulted on note. Thereafter, pursuant to the provisions of the National Housing Act, the bank was reimbursed, by the plaintiff, the United States, which is now the owner and holder of the note and seeks judgment against the makers for the balance due on note.

Makers in their answer set up two separate defenses, first that plaintiff was not a holder in due course; and secondly, that the plaintiff was barred by the statute of limitations.

It was held that the defense that the bank and the plaintiff its assignee, was not a holder in due course, was not tenable under the provisions of section 96 of the Negotiable Instruments Law of New York. The second defense, of statute of limitations, wherein maker alleged that seven years had elapsed before the commencement of this action by the plaintiff, was held not good against the United States.

Action by the United States of America against Joseph Warshaw, also known as Joseph Warshawsky, and Sadie Warshaw, also known as Sadie Warshawsky, under the National Housing Act to recover the amount allegedly due on a note. On plaintiff's motion for summary judgment.

Motion granted as against defendant last named.

NOTE—For similar decisions see B. L. J. Digest (Fifth Edition) § § 1383-1410.

Miles F. McDonald, U. S. Atty., of Brooklyn, N. Y., and Eli Resnikoff, Sp., Asst. to U. S. Atty., of New York City, for plaintiff.

George Green, of New York City, for defendant.

GALSTON, D. J.—This is a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, 28 U. S. C. A., following section 723c. The action arises under the National Housing Act.

The complaint alleges that the defendants on or about September 1, 1936, executed and delivered a promissory note in the sum of $551.90 to the order of B. F. Gilbert Co., Inc., that the instrument was thereafter, through mesne assignment, assigned to the Morris Plan Industrial Bank of New York; that the defendants defaulted when a balance of $314.79 was due and owing. Thereafter, pursuant to the provisions of the National Housing Act, the Morris Plan Industrial Bank of New York was reimbursed by the plaintiff, which is now the owner and holder of the note and seeks judgment against the defendants for the sum of $314.79.

The answer is a general denial, which also sets up two separate defenses: First, that the plaintiff is not a holder in due course; and secondly, that the plaintiff is barred by the statute of limitations.

Plaintiff's motion is supported by an affidavit of a Special Assistant United States Attorney for the Eastern District of New York. From the affidavit it appears that the note was delivered by the defendants to the Gilbert Company in connection with the application of the defendants for a loan, the proceeds of which were to be used for the purchase and installation of an oil burner and other heating equipment in defendants' premises in Brooklyn. The transaction was in accordance with the provisions of the National Housing Act, 12 U. S. C. A. § 1701 et seq. A photostatic copy of the note and of the credit statement are annexed and made part of the affidavit. At the time of the execution of the note, the proceeds were paid by the Morris Plan Bank, after obtaining from the defendants a certificate of installation dated July 18, 1936, a photostatic copy of which is also annexed to the affidavits. Thereafter the defendants, on January 1, 1938, defaulted in their obligation under the note, and it thereupon matured according to its terms. On July 12, 1938, the Bank was reimbursed by the United States of America under the contract of insurance customary in such cases, and the note was assigned to the United States of America. The complaint was filed on June 9, 1943.

The opposing affidavit of Sadie Warshaw recites that there were many complaints made to the contractors and to the Bank about the defective condition of the oil burner by her husband, and that the Bank was not a holder in due course, and that on June 9, 1943, when the complaint was filed, seven years had elapsed before the commencement of

the action by the plaintiff. It moreover appears that Sadie Warshaw is now a widow. When her husband died is not set forth in the affidavit.

The first affirmative defense, that the Bank was not a holder in due course, is not tenable under the provisions of Sec. 96 of the Negotiable Instruments Law of the State of New York, Consol. Laws, c. 38. See also United States v. Hansett, 2 Cir., 120 F. 2d 121; and United States v. McCulloch, D. C., 26 F. Supp. 7.

As to the second defense, that the plaintiff must be defeated by the statute of limitations, that likewise is not good against the United States. A statute of limitations will run against the Government only when it assents upon conditions prescribed. Lucas v. Pilliod Lumber Co., 281 U. S. 245, 50 S. Ct. 297, 74 L. Ed. 829, 67 A. L. R. 1350. Nor is the United States bound by a statute of limitations unless the Congress so provides. Phillips v. Commissioner of Internal Revenue, 283 U. S. 589, 51 S. Ct. 608, 75 L. Ed. 1289.

Plaintiff's motion is granted as against Sadie Warshaw. Where an instrument containing the words "I promise to pay" is signed by two or more persons, they are deemed to be jointly or severally liable thereon. New York State Negotiable Instruments Law, Sec. 36, subdivision 7. Apparently the action has abated as against Joseph Warshaw.

Note Containing Provision for Payment in Gold Coin of United States Not Void

Anderson v. Ruberg, Supreme Court of Idaho, 160 Pac. Rep. (2d) 456

Where note contains provision that it is payable in gold coin of the United States, the inclusion of said provision does not render it void and unenforceable because of statute declaring such provisions to be against public policy. The obligation is subject to discharge by the payment of lawful money in any coin or currency which was legal tender for payment of public or private debts.

A maker of a note who contends that the note was discharged by the holder thereof orally, the holder having died, has the burden of establishing by a preponderance of the evidence absolute renunciation of the note to him, by the holder during her lifetime. Evidence in instant case was not sufficient to establish such renunciation by the holder.

Action by Lenus L. Anderson against Herman Ruberg to recover on a promissory note. Verdict and judgment for plaintiff, and defendant appeals.

NOTE—For similar decisions see B. L. J. Digest (Fifth Edition) § 1216.

Judgment affirmed.

J. H. Felton, of Moscow, for appellant.

Earle W. Morgan, of Lewiston, for respondent.

BUDGE, J.—Substantially the following facts are disclosed by the record:

Respondent and Clara Anderson, now deceased, married in 1936; they moved to Clarkston, Washington, where they resided until Mrs. Anderson's death in 1942. Following her death respondent caused her estate to be probated in Asotin County, Washington. In the proceedings had in the probating of decedent's estate the promissory note, on which this action was brought, was distributed to respondent. There is no dispute between the parties with reference to the execution and delivery of the note by appllant to his mother. At the trial appellant testified that in the spring of 1941 he and his sister, Mrs. Selma Neyens, visited at the home of his mother and respondent, where a conversation was had with the mother with reference to the note; that at the time of this conversation his mother, his sister and he were present. In answer to the following questions appellant made the following answers:

"Q. What did your mother do about the note at that time, . . . A. In 1941?

"Q. Yes. A. Well, she handed the note back to me.

"Q. What did you do with it? A. I thought I put it in my pocket. . . .

"Q. Did you have it when you got home? A. No.

"Q. The fact that you missed it was communicated to your mother? A. Yes, it was.

"Q. Do you know whether or not, of your own knowledge, a search was made for that note in the house at Clarkston? A. Yes. . . .

"Q. Do you know whether you looked in the safe? A. Yes.

"Q. Was it in the safe? A. No. . . .

"Q. When did you next hear about this note after April, 1941? A. After my mother's death.

"Q. How long after her death? A. A couple of hours.

"Q. Was Mr. Anderson there? A. Yes, he was. . . .

"Q. And what was said there then? . . . A. He said that now I can sell the Randall Flat place and collect the notes."

On cross-examination appellant testified as follows:

"Q. Did you ask Mr. Anderson for the note? A. No, I did not.

"Q. It was within five minutes [after appellant arrived at his mother's home] he [Anderson] told you about selling the land, . . . A. Yes. . . .

"Q. When did you next see it [the note]? A. This is the first time. . . .

"Q. You knew about her estate being probated? A. Yes.

"Q. You were advised of the existence of this note at that time? A. Yes.

"Q. Did you ever pay anything to your mother for this note? A. Never did.

"Q. Did you pay anything to Mr. Anderson? A. No, never did."

Appellant, being recalled on direct examination, testified:

"Q. Herman, do you remember having a conversation with your mother down at Clarkston in the house down there some time in May or June, 1941? A. Yes, I did.

"Q. Who were present at that time? A. My mother, my sister, and myself. . . .

"Q. What did your mother tell you about the note at that time? A. She told me I never had to; she didn't want the money.

"Q. What did she do with the note? A. She handed the note back to me. . . .

"Q. What did she tell you? A. She told me she didn't want any payment from that note **in her lifetime, unless she needed it.**

"Q. And then you went down there and she told you you didn't need to pay it at all? A. That's right."

On further cross-examination appellant testified:

"Q. When you looked in the safe at the time you did look in the safe . . . were there any pouches in there, a note pouch: . . . A. I don't know. I kinda think there was. . . .

"Q. Did you look in that? A. No, I don't think I did."

Mrs. Selma Neyens, appellant's sister, testified on direct examination:

"Q. Did your mother talk over with you the question of this note? . . . A. Yes. . . .

"Q. Were you down there when your mother and Herman had a conversation about this note? A. Yes, I should judge in May or June. . . .

"Q. Will you give that conversation? . . . A. He said he had made arrangements to pay for this note and my mother said, no, she had never intended to have him pay the money, but she wanted to give it as a gift, and then she went and got this note and handed it to my brother . . . Well, then she handed him the note and she said she never planned on him paying this. . . . she said, **'If I ever need help I can go to you.'**

"Q. . . . did you hear anything about the note? A. Yes, we did.

"Q. When was this? A. Oh, it was in about 1942 and then it was lost.

"Q. Did you and your mother try to find it? A. Yes.

"Q. What search did you make? A. Through the safe and different places she thought it could have been.

"Q. Could you find it? A. No. . . .

"Q. Did you or your mother, or either of you, inquire of Mr. Anderson as to the whereabouts of the note? A. Yes."

It might be observed here that appellant testified that he did not ask Anderson for the note, neither did his mother, in his presence, nor did his sister.

Respondent, in rebuttal, testified in part as follows:

"Q. Do you remember as a fact when your wife died? . . . A. Oh, yes, yes.

"Q. Was Herman there at the time she died? A. He came, yes, like he said he did.

"Q. At that time did you tell him: 'Now my wife is dead and I can

sell the Randall Flat'? A. I didn't talk about anything like that, oh, no, I had the respect for my wife and I didn't do anything like that.

"Q. Now, at that time, did you say, 'Now I can collect on the notes'? A. I didn't say that either because she was loving her boy Herman more than any of the children, and I didn't push collection of the note.

"Q. . . . did you, within two hours of the time your wife died, while she was in the next room, and when Herman and Mrs. Neyens were present, say: 'Now I can sell the Randall Flat and now I can collect on the notes'? A. No, that's a lie.

"Q. Did you ever say such a thing? A. No.

"Q. Did you ever say such a thing to Herman? A. No.

"Q. Did you ever say such a thing to Mrs. Neyens? A. No.

"Q. Did you ever say such a thing to anyone else not there present? A. No, I didn't. . . .

"Q. You had a safe in your house? A. Yes, a safe, yes.

"Q. Did you ever see Plaintiff's Exhibit 1 in Evidence [the note] in that safe? A. Well. I don't see good now, but that is his signature and that was there because my wife put it there.

"Q. Did you see it there? A. I saw it there some time.

"Q. Was it in a container in the safe? A. There was two boxes, drawers like there be in the bank, two drawers, and there was papers in both of them.

"Q. Was this [note] in any kind of pouch? A. The notes were in the pouch . . .

Q. Tell us, if you know, whether this [note] was in the safe at all times until your wife died? A. I never knew anything else.

"Q. Was it in your safe after she died, for a time? A. Yes, it was. We took it up."

Mrs. Neyens testified, on cross-examination, that there was a safe in the pantry; that her mother went and got the note out of the safe, and handed it to her brother. Appellant testified that he and his mother searched for the note in the safe but did not look in the note pouch. An examination of the note discloses that it is in the same condition as when delivered by appellant to his mother.

At the conclusion of the trial the jury returned a verdict in favor of respondent. Judgment was entered on the verdict, from which this appeal is prosecuted.

Appellant relies for a reversal upon four assignments of error. If we are correct in the conclusion we have reached, we need consider only three of the assignments.

The first assignment of error is predicated upon the action of the court "in refusing to grant a judgment of non-suit against the plaintiff or direct a verdict in favor of the defendant at the close of all of the evidence for the reason that the positive, uncontradicted testimony of Mrs. Neyens and Mr. Ruberg showed that Mrs. Anderson, the holder, had expressly renounced her rights against appellant after the maturity of the note, . . ."

It might be proper here to call attention to the fact that appellant in his notice of appeal, "appeals to the Supreme Court of the State of Idaho from that certain 'Judgment on Verdict' dated the 16th day of December, 1944, . . . and from that certain 'Order Denying Motion for Judgment Notwithstanding Verdict' dated the 16th day of January, 1945, . . . and from all of the judgments in this cause and from all of the orders denying motion for judgment notwithstanding verdict. This appeal is taken from the whole of said judgment or judgments and order or orders, and from each and every part thereof."

As was said in Cady v. Keller, 28 Idaho 368, 154 P. 629, 630:

"Section 4807, Rev. Codes [sec. 11-201, I. C. A.], fixes the time within which appeals may be taken from judgments and certain orders made and entered in district courts to this court, but no provision is made for an appeal from an order denying a motion for judgment notwithstanding the verdict, and, in the absence of such provision, it is not an appealable order. This will therefore be treated as an appeal from the judgment alone."

Hence, we will consider this an appeal from the judgment alone.

The first point sought to be made by appellant is that the positive, uncontradicted testimony of Mrs. Neyens and Mr. Ruberg showed that Mrs. Anderson, before the maturity of the note, expressly renounced the debt and delivered the note to appellant under the provisions of sec. 26-804, I. C. A., which provides:

"The holder may expressly renounce his rights against any party to the instrument before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. . . . A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon."

Consequently no recovery could be had. There is no contention made that there was a renunciation in writing.

We are first confronted with the question of whether the evidence is sufficient to establish an absolute and unconditional renunciation of the debt within the meaning of sec. 26-804, supra, and, second, whether the testimony of the witnesses, appellant and his sister, as to what their mother said to them, heretofore recited, was admissible, being hearsay.

Conceding, but not deciding, since there is respectable authority holding that such statements are admissible under varying circumstances, that the testimony as to what deceased said to appellant and his sister is admissible, we still have the general rule that statements of persons since deceased are always to be regarded with caution. Eaton v. New York L. Ins. Co., 315 Pa. 68, 172 A. 121, 95 A. L. R. 462.

The mere fact that the evidence—consisting entirely of admissions, and what is worse, of the admissions of a person since deceased, and who

hence cannot contradict the witness—neither can the witness, be otherwise contradicted, is perhaps the weakest species of evidence, and subject to greater suspicion when dealt with by the trier of the fact, who must determine its credibility, the credibility of the witness being exclusively a question for the jury. Sec. 16-201, I. C. A.

Mrs. Neyens merely testified that when the deceased handed her brother the note she, the deceased, said she never planned on him [appellant] paying it, and she said, "If I ever need help I can go to you." Appellant testified that his mother said she didn't want any payment from that note in her lifetime, unless she needed it. Whereupon counsel for appellant, by leading and suggestive question couched in the following language, asked: "And then you went down there and she told you you didn't need to pay it at all," to which appellant answered, "That's right."

In the light of the foregoing testimony elicited from appellant and his sister, coupled with the language of the statute, sec. 26-804, supra, the jury was justified in the exercise of caution in accepting or rejecting the statements of appellant and his sister as to what their mother said, in determining whether an absolute and unconditional renunciation of the debt had actually been made.

Every material fact offered in evidence, other than the testimony as to what the mother is alleged to have said to appellant and his sister, is categorically denied by respondent. We are not constrained to hold that the positive, uncontradicted testimony of appellant and his sister established the fact that the deceased had, prior to her death, expressly, absolutely and unconditionally renounced the debt, though not controverted, entitled appellant to judgment in his favor. Neither are we inclined to hold that the uncontradicted testimony of the above named witnesses established the delivery of the note by the deceased to appellant. The rule contended for by appellant, however, requires an examination of all the facts and circumstances in testing the reliability of the testimony of appellant and Mrs. Neyens touching the renunciation and delivery of the note.

Summarizing the evidence as a whole, it appears there is no denial of the execution and delivery of the note by appellant to deceased; the note was in the same physical condition when introduced at the trial as it was when delivered to deceased; the note was placed in a note pouch by deceased and the pouch was placed in the safe, and was seen there by respondent, therefore, deceased knew where the note was. The note was found in the note pouch in the safe by respondent and by him delivered up to the court of probate, and distributed to respondent, who became the owner thereof. Appellant had notice of the probate proceedings and the existence of the note. Neither appellant, his sister, nor the deceased, as appears from appellant's testimony, examined the note pouch in the safe in an effort to locate the note. No written evidence of any kind,

after discovery of the loss of the note as testified to by appellant, passed between appellant and his mother. No statements were ever made by appellant or deceased to anyone, other than between themselves and Mrs. Neyens, that the note had been lost, although appellant testified they knew it had been lost. Appellant made no inquiry of respondent about the note, nor in any manner intimated to anyone in any way the nature of his defense to defeat payment of the note until appellant filed his answer.

The burden rested upon appellant to establish by a preponderance of the evidence absolute renunciation of the debt, coupled with the delivery of the note to him by his mother during her lifetime.

We think the questions, whether or not the debt was renounced, and whether or not the note was delivered to appellant within the terms of the statute, are questions of fact for the jury to determine from all the evidence and surrounding circumstances developed upon the trial. The jury heard all the testimony, observed the demeanor of the witnesses while testifying, their interest or lack of interest in the outcome of the litigation, and concluded by their verdict that appellant had not met the burden of proof required or necessary to establish the fact of renunciation of the debt or delivery of the note to appellant by his mother. Davenport v. Burke, 30 Idaho 599, at page 604, 167 P. 481; Duthweiler v. Hanson, 54 Idaho 46, at page 54, 28 P. 2d 210.

Appellant urges the court erred in giving instruction No. 6, especially in saying that "you are not bound to accept the testimony of any witness as true, whether the witness be directly contradicted by other testimony or not," for the reason that the court and jury must accept as true the positive, uncontradicted testimony of a credible witness, unless such testimony is inherently improbable. Said instruction, when applied to the facts and circumstances disclosed by the record and considered in connection with the instructions as a whole, does not constitute prejudicial error. Pierstorff v. Gray's Auto Shop, 58 Idaho 438, 74 P. 2d 171; First Trust & Sav. Bank v. Randall, 59 Idaho 705, 89 P. 2d 741; Gray v. Fraser, 63 Idaho 552, 123 P. 2d 711. If testimony is inherently improbable, or rendered improbable by facts and circumstances, it may be disregarded by the jury even though it be uncontradicted and positive, and from a credible witness. If the jury believed that the testimony of appellant and his sister as to what deceased said, or whether she said anything or not, or whether she delivered the note, was inherently improbable, or rendered improbable by facts and circumstances, the jury was at liberty to disbelieve such testimony. In other words, if any circumstances appearing in the case would justify a reasonable man in disregarding the statements of a witness, the jury may refuse to believe such statements, even though not directly challenged. Pierstorff v. Gray's Auto Shop, supra.

Appellant makes the further contention that the court erred in

entering judgment on the verdict for the reason that the obligation was payable in gold coin, and that any payment in gold coin is contrary to law.

True, the note contains a provision that it is payable in gold coin of the United States, but it does not follow that the note is void and unenforceable. Moreover, there is no merit in this contention. We quote 31 U. S. C. A. § 463 (a) which is self-explanatory:

"Every provision contained in or made with respect to any obligation which purports to give the obligee a right to require payment in gold or a particular kind of coin or currency, or in an amount in money of the United States measured thereby, is declared to be against public policy; and no such provision shall be contained in or made with respect to any obligation hereafter incurred. Every obligation, heretofore or hereafter incurred, whether or not any such provision is contained therein or made with respect thereto, shall be discharged upon payment, dollar for dollar, in any coin or currency which at the time of the payment is legal tender for public and private debts. . . ." Norman v. Baltimore & O. R. Co., 294 U. S. 240, 55 S. Ct. 407, 79 L. Ed. 885, 95 A. L. R. 1352; Nortz v. United States, 294 U. S. 317, 55 S. Ct. 428, 79 L. Ed. 907, 95 A. L. R. 1346; Perry v. United States, 294 U. S. 330, 55 S. Ct. 432, 79 L. Ed. 912, 95 A. L. R. 1335; Holyoke Water Power Co. v. American Writing Paper Co., 300 U. S. 324, 57 S. Ct. 485, 81 L. Ed. 678.

The obligation was subject to discharge by the payment of lawful money in any coin or currency which was legal tender for the payment of public or private debts. Respondent did not seek to recover payment in gold coin, but for the principal sum of $1000, with legal interest.

It follows from what has been said that the judgment must be affirmed, and it is so ordered, with costs to respondent.

Intention of Parties at Time of Transfer of Account Controlled in Determining Survivors Right to Joint Account

Hudson City Savings Bank v. Havemeyer, Court of Chancery of New Jersey, 43 Atl. Rep. (2d) 834

A bank account standing in the name of mother and daughter, K. and R., "Either or the survivor to draw" and no evidence is shown proving the ownership or source of the money in the account, and where the form of the account is practically the only evidence of the interest of the parties therein, it is held that the surviving daughter is entitled to fund.

NOTE—For similar decisions see B. L. J. Digest (Fifth Edition) § 458.

The burden of proof to disprove the intent of the mother (depositor) to make a present gift to the daughter was on the one who attacked the transfer, the executor of the mother's estate, in the instant case. The intention of the parties at the time of transfer of savings account controlled.

Bill of interpleader by Hudson City Savings Bank against George Havemeyer, executor of the last will of Fredericke Klosterman, deceased, and another, to determine ownership of balance of a savings account in complainant's bank.

Decree advised in accordance with opinion.

Rudolph Schroeder, of Hoboken, for defendant George Havemeyer, executor.

Nathan Reibel, of Elizabeth, for defendant Marie Reimers, administratrix of estate of Mary Reimers.

William A. Moore, of Trenton, for Attorney General of New Jersey.

EGAN, Vice Chancellor.

The complainant filed a bill of interpleader herein to determine the ownership of a sum of money amounting to approximately $2,687.65. The money is the balance of a savings account in complainant's bank standing in the name of Fredericke Klosterman or Mary Reimers. There are two separate signature cards on file in the bank, one signed by Fredericke Klosterman, and the other by Mary Reimers; each card had stamped thereon "either or the survivor to draw." Mary Reimers was the daughter of Fredericke Klosterman.

Fredericke died December 9, 1933, leaving a last will and testament wherein she appointed the defendant, George Havemeyer, executor under her will, a claimant herein. Mary died on August 30, 1940, intestate, leaving her surviving, her daughter, Marie Reimers, who is administratrix of her mother's estate, and a claimant herein.

Mrs. Klosterman opened the bank account in her name on January 2, 1912. Her original signature card, signed by her, gave her address as 532 Newark Avenue, Jersey City, New Jersey (Exhibit D-5). Sometime later the account was changed to read "In account with Fredericke Klosterman or Mary Reimers." The signature cards of Fredericke and Mary show that both parties resided at 440 Bergan Avenue, Jersey City, and had stamped thereon "either or the survivor to draw" (Exhibit D-5). When the change in the name of the account to Klosterman or Reimers was made does not appear. The testimony however, indicates that Mrs. Klosterman's husband died in September, 1915, and that thereafter she went to live with her only child, her daughter Mary, at 440 Bergen Avenue, Jersey City. The administratrix says that her mother and her grandmother Fredericke lived at the latter address as early as 1921.

There were eighteen deposits made in the bank account (Exhibit D-2)

from 1913 to 1924 inclusive; one was made in 1913, three in 1915, three in 1916, and eleven thereafter up to 1924. Eleven deposit slips were produced, eight in the name of Fredericke Klosterman and three in the name of Mary Reimers. On January 7, 1926, $100 was withdrawn from the account by Mary Reimers, who signed the withdrawal slip therefor. Mrs. Klosterman withdrew $1,000 on July 2, 1931; $2,000 and $100 on October 28, 1931; $50 on July 23, 1932; and $100 on June 1, 1933.

A pass book for the account was issued in 1926 in the name of "Fredericka Klosterman and Mary Reimers"; stamped thereon was the following "either and the survivor to draw" (Exhibit D A-1).

In the latter part of 1931 Mrs. Klosterman was admitted to the Fritz Reuter Altenheim, a home for aged people, in North Bergen, New Jersey. At the time of her admission she handed the pass book aforesaid to Mrs. Helen Wehman, matron of the home. Mrs. Wehman held the pass book until after the death of Mrs. Klosterman, when she delivered it to the attorney for the executor aforesaid.

The administratrix contends that the fund was a joint tenancy and that title thereto vested in Mary Reimers as surviving joint tenant on the death of Fredericke.

The executor denies that the account was one of joint tenancy, and charges that the funds were the sole property of Mrs. Klosterman and that at her death they became a part of her estate.

The testimony gives no indication of the ownership or source of the money in the account. However, much of the moneys appears to be earned interest rather than sums deposited.

After Mrs. Klosterman entered the Fritz Reuter Altenheim in the latter part of 1931, she, on November 6, 1931, executed a testament whereby she made the home the sole beneficiary of her estate.

Practically all the evidence in this case appears to be in the form of the account itself.

The executor contends that since the bank account does not contain the word "joint," it is not a joint account; and, consequently, the administratrix must fail in her claim.

In the instant case mother and daughter dealt with the account as though it was the sole property of each. This appears to be so, not alone from the conduct of the depositors, but from the attitude of the bank. The bank seemed to consider the account a joint account payable to either of the parties or to the survivor. Nevertheless, whether or not the account was a joint one, the contract between the bank and the depositors, in the absence of any other evidence, in my opinion, determines the title to the funds. The bank agreed to pay the balance in the account, on the death of one of the parties, to the survivor. There is no other testimony in this proceeding except the contract with the bank to guide the court to a decision. The law, in the circumstance, favors the administratrix.

It is provided in R. S. 17:9-5, N. J. S. A., that:

"When a deposit has been, or shall be, made in any bank or trust company transacting business in this state in the names of two persons, payable to either, or payable to either or to the survivor, the balance or any part thereof to the credit of said account including interest or dividends thereon may be paid to either of said persons during the life of both and in case of the death of either of said persons the balance to the credit of said account including any dividends or interest thereon shall be paid to the survivor, and the legal representatives of the one dying shall not have any claim or right thereto notwithstanding that such balance or any part thereof may have been the property of the one dying."

See also R. S. 17:9-5.1 N. J. S. A.

In New Jersey Title Guarantee & Trust Co. v. Archibald, 91 N. J. Eq. 82, 108 A. 434, it was, among other things said:

"It will be noticed that it does not appear clearly from the bill of complaint whether the moneys deposited belong originally wholly to the mother, or in part to her and in part to the daughter. But that is immaterial.

"We think that where, as here, moneys belonging originally either wholly to the mother, or in part to her and in part to her daughter, are deposited by them in a bank in their joint names, and at the same time they both sign and deliver to the bank a writing stating that 'This account and all money to be credited to it belongs to us as joint tenants and will be the absolute property of the survivor of us, either and the survivor to draw'—upon the death of the mother the undrawn moneys belong to the surviving daughter."

In Commercial Trust Co. v. White, 99 N. J. Eq. 119, 132 A. 761, 763, affirmed 100 N. J. Eq. 561, 135 A. 916, Vice Chancellor Fielder in his opinion indicated that in the absence of any other proof the writings signed by the parties to the account determine their rights in the account. The Vice Chancellor said, among other things:

"In opening the accounts, Bullis had either a donative intention of a then present gift to Mrs. White of an interest in the moneys deposited therein, with the right to receive what remained to the credit thereof at his death in case she survived him, or an intention merely to use her as a convenience in withdrawing money for him in his lifetime, with no beneficial interest to her in the money, except, perhaps, after his death, in case she survived him. There being no direct testimony to show what his purpose was, the rights of the donor and donee must be determined upon the effect to be given the writings which they signed and delivered to the several banks, in connection with the surrounding circumstances."

I do not find in this case any evidence which would indicate that the name of Mary Reimers was added to the account for the convenience of Mrs. Klosterman. Mrs. Klosterman was able to read and write and seemed to be able and independent in her movements. The activity in the account itself indicates that Mrs. Klosterman called at the bank to make

deposits and to make withdrawals. Mary Reimers withdrew moneys from the account which indicates that she exercised dominion over the account.

See Kaufman v. Edwards, 92 N. J. Eq. 554, 113 A. 598, 603, wherein Vice Chancellor Buchanan said in part:

"In the present case, I am inclined to the opinion that the intent was of a present transfer and vesting of the right in remainder (and, probably, indeed, of a right in the entire chose during Mrs. Kaufman's life), from the fact of the indiscriminate mingling in the deposits of the contributions of both parties, and the keeping of no record by either as to the amounts respectively contributed. Such conduct, it seems to me, negatives the idea of the retention of separate interests and is compatible only with the idea and intent of a joint ownership in the mingled and indistinguishable assets, especially under the circumstances of close relationship and mutual trust existing between this mother and daughter."

In this case, the court held the burden of proof to disprove the intent to make a present gift to the donee, was on the one who attacks the transfer. In the instant case the burden was on the executor of Mrs. Klosterman. He has not sustained it.

In Trenton Saving Fund Society v. Byrnes, 110 N. J. Eq. 617, 160 A. 831, 832, Vice Chancellor Buchanan, among other things, said:

"Under the authority of the Archibald case [N. J. Title Guarantee, etc., Co. v. Archibald, 91 N. J. Eq. 82, 108 A. 434] supra, the evidence of the transaction mentioned—the signing of the card by both persons, and the language on the card so signed (all of which are identical with the facts in the instant case)—constitutes sufficient evidence, prima facie, of the requisite donative intent."

The relationship between Mrs. Klosterman and Mary Reimers, that of mother and daughter, may be said to have a bearing upon the act of the mother, or to have influenced her, in adding her daughter's name to the account. It is most natural for a parent to provide for, or to assist her child in a financial way. The court observed in Doughty v. Dobbin, 109 N. J. Eq. 513, 158 A. 768, 771:

"It is natural that a father should provide for his daughter, as the paternal feelings of a good man prompt him to do so; and when a gift is made under such circumstances the law presumes such act, in all respects, proper and just, until the contrary is made to appear. The burden is on him who alleges the contrary to prove it, and the proof must be convincing, leaving no reasonable doubt as to the intention of the donor."

Other cases in point are: Hickey v. Kahl, 129 N. J. Eq. 233, 19 A. 2d 33; Steinmetz v. Steinmetz, 130 N. J. Eq. 176, 21 A. 2d 743; Lester v. Guenther, 132 N. J. Eq. 496, 28 A. 2d 777.

Counsel for the executor attempted to offer evidence remote from the time when the account was transferred to the donee, and counsel for the administratrix objecting thereto was sustained. I feel that whatever Mrs. Klosterman told somebody else in the absence of her daughter Mary Reimers about her (Mrs. Klosterman's) interest in the account, many years after the change therein was made, is not admissible. The case of Wolf v. Wolf, 136 N. J. Eq. 403, 42 A. 2d 300, cited by counsel for the executor, has no bearing upon the facts in the instant case.

Bankers' Trust Co. v. Bank of Rockville Center Trust Co., 114 N. J. Eq. 391, 168 A. 733, 737, 89 A. L. R. 697, is authority for this court's attitude in refusing to receive testimony remote from the transaction. In that case it was, among other things, said:

"The proofs which shall raise a resulting trust, or rebut the presumption of a gift or settlement in the case of a child or wife, must be of facts antecedent to or contemporaneous with the purchase, or else immediately afterwards, so as to be in fact part of the same transaction. A resulting trust cannot be raised from matters arising ex post facto."

The intention of the parties at the time of the conveyance or transfer controls; and the instant case it is evidenced by the agreement with the bank.

It is my opinion that the administratrix, Marie Reimers, is entitled to the balance remaining in the account aforesaid. I shall advise a decree to this effect.

Deposits in Bank in Violation of Law Where City Councillor Is Officer of Bank Held Illegal

City of London v. First National Bank of Lincoln, Supreme Court of Nebraska, 19 N. W. (2d) 156

The deposit of city funds in a bank within the limits of said city is illegal and void while an officer of said city is either a stockholder, officer or director of said bank. Such deposit is prohibited by virtue of the provisions of the city charter and state statute. Each deposit of city funds in a bank is a contract express or implied between the city and the bank, and in the instant case the contract being prohibited by law it is held immaterial whether the officer of the city actually profits from the contract or whether he is actually influenced by his interest. The sole test is whether there is any contract to which the city or anyone for its benefit is a party in which the officer of the city is interested directly or indirectly by virtue of an opportunity to benefit or profit therefrom.

NOTE—For similar decisions see B. L. J. Digest (Fifth Edition) § 410.

Action by the City of Lincoln against the first National Bank of Lincoln for declaratory judgment to determine whether it was legal to continue deposit of plaintiff's funds in defendant bank while a member of the city council was a stockholder, director, and officer of the bank. From an adverse decree, plaintiff appeals.

Reversed with directions.

Max Kier, A. A. Whitworth, and Jack Devoe, all of Lincoln, for appellant.

Cline, Williams & Wright, of Lincoln, for appellee.

Heard before SIMMONS, C. J., and PAINE, CARTER, MESSMORE, YEAGER, WENKE, and CHAPPELL, JJ.

CHAPPELL, J.—The city of Lincoln sought a declaratory judgment in the district court for Lancaster county to determine whether it was legal to continue the deposit of its funds in the defendant First National Bank of Lincoln, Nebraska, while a member of the city council was a stockholder, director or officer of the bank. The question arose by reason of identical provisions contained in section 3, article VII, home rule charter, City of Lincoln, 1917, and section 15-603, R. S. 1943, applicable to cities of that class. The charter and the statute each provide in part: "No officer of the city shall be interested directly or indirectly in any contract to which the city, or anyone for its benefit, is a party; and such interest in any contract shall avoid the obligation thereof on the part of the city. . . . Nor shall any officer receive any pay or perquisite from the city other than his salary . . ."

The district court by its decree found that the deposits of city funds in defendant bank were not prohibited by either of such provisions, notwithstanding that a member of the council was a stockholder, director and officer of the Bank. Motion for new trial was overruled and the city appealed, contending that the decree is not sustained by the evidence and is contrary to law. We sustain these contentions.

The matters presented for decision involve only questions of law. There is no dispute concerning the facts. On August 8, 1938, the city council by resolution authorized and empowered the city treasurer, their appointee, to deposit city funds in any one bank within the city of Lincoln in an amount up to the paid-up capital and surplus of the bank, not to exceed ninety per cent of the value of securities to be pledged to secure such deposits. The resolution also designated classes of securities permitted to be used by the bank. On May 15, 1939, the council adopted a resolution designating certain banks, including defendant, as sole and only depositories for city funds.

By arrangement with the city treasurer since 1938, division as to time and amount of deposits has been upon a basis of 15 months in proportion to capital and surplus, four months of which were allotted to

the Continental National Bank, four to the National Bank of Commerce and seven to defendant bank. At the time of trial defendant bank was being used for a depository and would continue to be so used for approximately seven months. Deposits are made daily, recorded in a regular bank book and withdrawn by check. Suburban banks have water and light department moneys on deposit but do not have active checking accounts.

Stanley Maly, a stockholder, director and vice-president of defendant bank, was elected and qualified as a member of the city council on May 12, 1941, for a four year term. Subsequently the city treasurer has deposited city funds in defendant bank and it has accepted them claiming it was legally entitled to do so. At the time of the trial there was on deposit with defendant approximately $1,250,000 of city funds and deposits will continue to be made in the future if legal to do so. To secure the city funds defendant has placed in escrow with the Federal Reserve Bank of Kansas City, Missouri, $1,000,000 in United States Treasury bonds at 2¾ per cent, due December 15, 1965.

The evidence offered by defendant consists of a stipulation received subject to the objection that it was immaterial and irrelevant. This evidence is that from 1911 to 1913, from 1917 to 1921 and from 1929 to 1931 certain mayors of the city were stockholders and directors of banks, including defendant, in which city funds were deposited during that period. In this connection the position of defendant is that this evidence discloses an administrative interpretation of the statute involved contrary to the city's contentions both before and after the adoption of the home rule charter which should be considered by the court in giving the provisions involved their true construction.

At the outset it should be said that the resolutions authorizing the city treasurer to deposit city funds in any one bank upon certain conditions of security and the later designation of defendant bank as one of the sole depositories for city funds were passed by the city council long before Stanley Maly became a councilman. The sole question presented here is whether the First National Bank, of which Stanley Maly is admittedly a stockholder, director and officer, is prohibited from receiving deposits of city funds because he is now a member of the city council.

It must be conceded that the pleadings present a justifiable controversy under the declaratory judgment act, Rev. St. 1943, §§ 25-21, 149 to 25-21, 164. We have held that the term "person" used in the declaratory judgment act is broad enough to include the state or any subdivision thereof. State ex rel. Smrha v. General American Life Insurance Company, 132 Neb. 520, 272 N. W. 555. In both Dill v. Hamilton, 137 Neb. 723, 291 N. W. 62, 129 A. L. R. 743, and Lynn v. Kearney County, 121 Neb. 122, 236 N. W. 192, this court approved the views expressed in State v. Grove, 109 Kan. 619, 201 P. 82, 84, 19 A. L. R.

1116, wherein it was said: "It is hardly conceivable that any fundamental principle of our government, beyond legislative control, prevents two disputants, each of whom sincerely believes in the rightfulness of his own claim, but each of whom wishes to abide by the law, whatever it may be determined to be, from obtaining an adjudication of their controversy in the courts without one or the other first doing something that is illegal . . . if he is mistaken in his view of the law." We turn then to decision of the important question, whether a bank deposit constitutes a contract within the prohibitions of the charter and statute. It seems clear under the circumstances that if a deposit in a bank is a contract and an officer of the city has an interest therein that such a contract comes squarely within the charter and statute. If a deposit is a contract it is one made by volition of the parties as distinguished from one that is ministerial, and it is not one of common benefit or privilege open to all citizens upon the same terms or standard rates such as water or electricity furnished by the city. The electors and Legislature had a right to include the provisions here involved in the charter and statutes which should not and cannot be voided in a proper case by judicial construction.

We find that the question presented must be answered affirmatively. It is said in 7 Am. Jur., sec. 405, p. 286: "The term 'deposit,' when used in connection with a banking transaction, denotes a contractual relationship ensuing from the delivery, by one known as the "depositor," of moneys, funds, or things into the possession of the bank, which receives the same upon the agreement to pay, repay, or return, upon the order or demand of the depositor, the moneys, funds, or equivalent amount, or things, received; this agreement on the part of the bank is usually a tacit one and implied . . ." Also in 9 C. J. S., Banks and Banking, § 267b, p. 545: "The relation of banker and depositor is created by contract." This court has held that the relation of banker and depositor can only be created by contract express or implied. State v. Citizens State Bank, 117 Neb. 358, 220 N. W. 593. See, also, Citizens' State Bank v. Worden, 95 Neb. 53, 144 N. W. 1064, wherein there appears an affirmance of the contractual nature of a deposit in a bank.

The resolution of the council giving the city treasurer authority to deposit and the designation by the council of defendant bank and others as the sole and only depositories are only resolutions of the council. Such a resolution standing alone is not a contract. The former was simply a grant of authority to the treasurer, and the latter a limitation of his authority naming and designating certain banks of which defendant was only one. The actual deposit of city funds as authorized in a designated bank creates the contractual relationship between the city and the particular bank in which the deposits are made. In this connection each daily deposit gives rise to a new and continuous contractual relationship between the city and the bank until the undertaking of the

bank to pay upon proper demand by check according to general usage in such cases or according to special stipulation with the city is fully performed. See Citizens' State bank v. Worden, supra.

Manifestly the defendant is deriving a benefit or profit from the deposits of the city funds. The defendant in its answer so admitted. As a business institution it could not ordinarily be expected to receive and disburse so large an account without prospect of profit commensurate with the service required. Naturally, any person who was a stockholder, director or officer thereof would be both directly and indirectly financially interested in any contractual arrangement which returned a profit to his corporation. However, we call attention to the fact that if the contract is of a kind prohibited by law it is immaterial whether the officer of the city actually profited from the contract or whether he was actually influenced by his interest. The question is whether there was any contract to which the city or anyone for its benefit is a party in which the officer of the city was interested directly or indirectly by virtue of an opportunity to benefit or profit therefrom.

In People ex rel. Schenectady Illuminating Co. v. Board of Sup'rs of Schenectady County, 88 Misc. 226, 151 N. Y. S. 830, 831, which was affirmed in 166 App. Div. 758, 151 N. Y. S. 1012, it was said: "The contract is unenforceable, not because a public officer has failed in his duty, but because he has some interest in conflict with his duty. The interest referred to is not necessarily a money interest, nor is it an interest sufficiently large to induce a man generally honest to disregard his duty. It may be indirect. It is such an interest as is covered by the moral rule: No man can serve two masters whose interests conflict. Smith v. City of Albany, supra [61 N. Y. 444]. Too great refinement of reasoning must not be indulged to uphold a contract against this provision of the law on the ground that the interest is so little or so indirect."

In Neisius v. Henry, 142 Neb. 29, 5 N. W. 2d 291, 294, we had occasion to examine a statutory provision which uses language almost identical with the city charter and statute involved. That statute, now section 17-611, R. S. 1943, provides in part: "No officer of any city or village shall be interested, directly or indirectly, in any contract to which the corporation, or any one for its benefit, is a party; and any such interest in any such contract shall avoid the obligation thereof on the part of such corporation, nor shall any officer receive any pay or perquisites from the city other than his salary. . . . " In the opinion last above cited it was said: "It is argued by defendants that this statute does not by its terms, or by implication, render the contract void, but that on the contrary it is carefully worded so as to make it voidable only. If the contract be voidable only under this statute, some affirmative act on the part of a city would be required to terminate liability. We think the statute clearly expresses a contrary meaning. The use of the words

'and any such interest in any such contract shall avoid the obligation thereof on the part of such corporation' does not import any affirmative action on the part of the city to avoid the obligation of the contract. The interest of the officer in the contract avoids ipso facto the obligation thereof on the part of the city." We therein also quoted from and followed the construction placed upon the same statute in Village of Bellevue v. Sterba, 140 Neb. 744, 1 N. W. 2d 820, wherein it was said: "Where a statute prohibits an officer of a village from having an interest in any contract with the village, and avoids the obligation of any such contract so made, it is void for all purposes, and any funds paid out because of such purported contract may be recovered back at the suit of the village or of a taxpayer suing in its behalf." In Neisius v. Henry, supra, we also disapproved the reasoning in Call Publishing Co. v. City of Lincoln, 29 Neb. 149, 45 N. W. 245, in the following language: "The reasoning indulged in fails to give effect to the words 'and any such interest in any such contract shall avoid the obligation thereof on the part of such corporation.' To 'avoid the obligation' is plain language and clearly implies relief from all liability, not only as to unperformed portions of the contract, but from the whole transaction from its very inception."

In Hobbs, Wall & Co. v. Moran, 109 Cal. App. 316, 293 P. 145, 146, it is said: "Such transactions are held to be void whether they arise from the relationship of any agency which is public, quasi-public, or private in its nature. The theory of the law is that a councilman or other officer of a city sustains the same fiduciary relationship toward the citizens of his community that a trustee bears to his cestui que trust. . . ."

The statement is made in 44 C. J. sec. 2176, p. 93: "Cases are numerous wherein a municipality was brought into contractual relation with firms or companies, of which a councilman or other city officer was a member, stockholder or employee, and the courts have usually applied the general doctrines to the undoing of such contracts, just as though the officers were individually interested." As stated in 37 Am. Jur., sec. 274, p. 897, "A charter or statutory provision which prohibits a municipal officer from being directly or indirectly interested in a contract with the municipality has been held to extend to contracts between the municipality and a corporation of which a municipal officer is a stockholder or stockholder and officer. Such a contract is void and incapable of ratification even though the municipal officer has no official connection with the contract and no knowledge of its existence." See, also, Ferle v. City of Lansing, 189 Mich. 501, 155 N. W. 591, L. R. A. 1917C, 1096 and annotation L. R. A. 1917C, 1099.

As said in Hardy v. City of Gainesville, 121 Ga. 327, 48 S. E. 921, 922: "A stockholder in a private corporation clearly has an interest in its contracts, and, if the city cannot make a contract with the officer

himself, it cannot make it with a corporation in which such officer is a stockholder." In Dillon, Municipal Corporations, vol. 2, (5th ed.) sec. 773, p. 1143, it is stated in somewhat different language: "At common law and generally under statutory enactments, it is now established beyond question that a contract made by an officer of a municipality with himself, or in which he is interested, is contrary to public policy and tainted with illegality; and this rule applies whether such officer acts alone on behalf of the municipality, or as a member of the board of council. . . . The fact that the interest of the offending officer in the invalid contract is indirect and is very small is immaterial." See, also, James v. City of Hamburg, 174 Iowa 301, 156 N. W. 394.

We can only conclude that the deposits of the City of Lincoln in defendant bank are prohibited by virtue of section 3, article VII of the home rule charter and section 15-603, R. S. 1943, while a member of the city council or officer of the city is a stockholder, director or officer of the bank. In arriving at this conclusion we have not overlooked the former executive or administrative construction of the charter and statute presented by defendant. We find that it is immaterial and of no effect under the circumstances presented. In Miller v. Iowa-Nebraska Light & Power Co., 129 Neb. 757, 262 N. W. 855, it was held by this court that: "Resort to contemporaneous construction of statute by administrative bodies is neither necessary nor proper where language used is clear, or its meaning can be ascertained by use of intrinsic aids alone." Also, it was held in Ehlers v. Farmers Mutual Ins. Co., 130 Neb. 368, 264 N. W. 894: "When the court of last resort has judicially construed a statute, the rule permitting recourse to contemporaneous construction of the statute by administrative or executive officials, charged with the enforcement of such statute, is inapplicable." See, also, 59 C. J., sec. 607, p. 1022, sec. 613, p. 1036.

We find that the language of the charter and statute is clear and unambiguous. Further both in Village of Bellevue v. Sterba, supra, the Neisius v. Henry, supra, this court has held under a statute, almost identical therewith, that a contract of a city in which an officer thereof has an interest is illegal and void for all purposes. The plain import of such provisions already unequivocally adjudicated cannot be changed or avoided by an erroneous administrative construction.

For the reasons heretofore stated the judgment of the district court is reversed and remanded with directions that the trial court enter a judgment finding and adjudging that the deposit of city funds in defendant bank is illegal and void while an officer of the city is either a stockholder, officer or director of defendant bank. An injunction will not be granted since deposits by the city may be discontinued at any time and we assume, as a matter of course, that both the city and the bank will abide by the final decision of the court.

Reversed with directions.

Law of Place of Payment Governs Note Unless Contrary Is Apparent

Okey v. Bargenholt, Supreme Court of Iowa, 19 N. W. Rep. (2d) 212

Where a payee of a note draws the instrument, dates it and makes it payable at the place of his own residence, and mails it to the maker in another state to sign and return, it is held that an intention of the parties to make it a contract of the state in which it is made payable may be inferred. The parties contract with reference to the law of the place of payment unless it clearly appears that they intend otherwise.

Action on promissory note. Defense, foreign statute of limitations. The court directed verdict for defendant. From the resulting judgment, plaintiff appeals.

Reversed.

Lee R. Watts and H. J. Kittleman, both of Corning, for appellant.

Thos. E. Mullin, of Creston, for appellee.

SMITH, J.—The sole issue here concerns the place of contract. It is conceded in argument that if the note sued on was a Colorado contract it is barred by the statute of limitations of that state. The factual evidence is not seriously in dispute. The controversy grows almost entirely out of the conflicting inferences drawn by the parties from the meager facts shown.

The note was dated "Corning, Iowa, Aug. 21, 1919," and was payable sixty days after date to the order of plaintiff "at the Okey Vernon National Bank, Corning, Iowa." Plaintiff and his brother, Ed Okey, operated the bank at that time.

Defendant left Corning in 1918 and became a resident of Colorado where he lived until 1930. Later he removed to El Paso, Texas, where he lived at the time of trial. He knew the Okey brothers and testified he visited plaintiff at the bank in 1930 on the occasion of his (defendant's) father's death. After he left Iowa his mother continued to live in Adams County.

Plaintiff and defendant were the only witnesses. Both were called on behalf of defendant. Neither gave a very clear picture of the transaction. Defendant at the time worked for the Burlington railroad company that operated a branch line in Nebraska from Alliance to Bridgeport about 35 miles distant from each other. His home, however, was Sterling, Colo.

On August 21, 1919, while in Bridgeport and being "a little short

NOTE—For similar decisions see B. L. J. Digest (Fifth Edition) § 1265.

of change" he drew a check on plaintiff's bank for $65 payable to the order of Bridgeport Bank and cashed it. He had no deposit account in plaintiff's bank. The same day he wrote a letter to Ed Okey (plaintiff's brother) on the stationery of a hotel at Alliance, Neb., in which he said: "I gave a check today for $65 **today** I got an option on house & lot at Bridgeport till I see if I can sell there, you pay this and I am sending note to cover this with mother as security so you know you are not going to **loose.**"

The letter had a postscript: "if this isn't O.K. let me know by return mail and I will try and obtain the money & send but didn't want to borrow here now."

The record does not show whether a note was enclosed or that Ed Okey ever answered the letter. Plaintiff testified that when the check came through to his bank for collection he (plaintiff) took it up with his own personal funds. He does not say whether he saw or relied on the letter to his brother Ed. He did not expressly say he sent the note to defendant for signature but implied he did so. "I don't know when I sent him the note to be signed, but ordinarily when we furnish money we date it the date of the note the date of the check."

He declined to say he didn't have the note when the check came in ("I didn't say that because I don't know") or that he later sent the note for signature. He does say: "I received the note through the mail. I don't know when I received the note, but I have the note and have the check for the money that I put up on the check, and I was to have Mrs. Teresa P. Bargenholt on the note and I never succeeded in getting it." He does not say he or anyone ever asked defendant's mother to sign the note.

At one place in his testimony plaintiff says: "The note came from Bridgeport and I made the notation on the stub there and just before it was due I dropped him a line there."

Defendant testified he first saw the note at Sterling, Colo. "The note was sent to me through the mail. Mr. Okey sent it. I signed it and sent it back to him. I was in Sterling, Colo. I sent by United States mail to Mr. Cliff Okey. It was signed by me in Colorado." He says it was possibly ten days after the check was written.

He admitted that he wrote the letter to Ed Okey (quoted above) but did not say whether he ever received a reply. He made no explanation of the possible implication in the letter that he was enclosing, or would furnish, a note "with mother as security." He definitely denied any recollection that his mother was to sign the note in suit. And closed his testimony with the statement: "I did not write Mr. Ed Okey about this check before I wrote the check or signed the note. I didn't have any correspondence about Exhibit 2 (the check) until after the same was written."

On this record the trial court concluded as a matter of law that the

note sued on represented a Colorado contract, barred under the Colorado statute, and directed a verdict for defendant.

By stipulation as to the limitation statute of Colorado and concession in argument as to its applicability here "if it is a Colorado contract," we are saved a discussion of section 11014 Iowa Code 1939.

We are of the opinion the letter of defendant to Ed Okey, bearing the same date as the date of the check and referring to a note being sent, with his mother as security, may be disregarded as having no material bearing on the question here. It merely indicates that defendant drew the check without any previous arrangement with or permission by the bank. There is no showing that Ed Okey or this letter to him had any connection with plaintiff's act in taking up the check or with the execution of the note.

While the evidence is not clear as might be desired the pertinent facts are fairly discernible. Defendant drew and cashed the check at Bridgeport, Neb., upon the bank in Corning, Iowa. Plaintiff voluntarily intercepted it and paid it out of his own funds. He then by mail sent defendant the note which defendant received in Sterling, Colo. **There is no evidence that he instructed defendant to return it by mail.** Defendant signed the note in Sterling and sent it to plaintiff by mail. The action here is brought on the note and not on any indebtedness claimed to have arisen by virtue of plaintiff's voluntary taking up of defendant's check.

Unless we are to overrule or ignore our decision in In Re Estate of Young, 208 Iowa 1261, 226 N. W. 137, we must hold this note, under the record as it stands, to be an Iowa contract. That case is not distinguishable from the instant one. Justice Albert who wrote the opinion fortifies it by citation of authorities that amply sustain it if they are to be followed. He frankly concedes there may have been some authority to the contrary (see e.g. Barrett v. Dodge, 16 R. I. 740, 19 A. 530, 27 Am. St. Rep. 777), but holds the general rule to be as stated in the opinion and adopts it as the rule in this state.

Defendant cites Tharp v. Thero, 112 Iowa 573, 84 N. W. 709, 710, but it is not in point except that involved an action by an Iowa plaintiff upon a note of a non-resident of Iowa, which had been signed by defendant in Colorado and mailed to plaintiff. There was a judgment for plaintiff and defendant appealed. The case was reversed because of error in refusing to permit defendant to show plaintiff's intent in regard to method of delivery of the note. On cross-examination of plaintiff he was asked if he expected the note would come by mail and if he expected defendant to "come back and bring them." The trial court sustained objections to both questions. These rulings were held to be reversible error.

The opinion says: "If the defendant deposited it in the post office in Idaho Springs, Colo., with the intent to have it transmitted to the

plaintiff without further action on his part, and intended such deposit as a delivery to him, it would undoubtedly be a good and complete delivery, if the plaintiff agreed, either expressly or impliedly, that it might be so sent to him. Hence we think the evidence was competent and material." That is not contrary to the doctrine announced by the Young case, supra.

In the instant case no effort was made to show the intent of the parties as to mode of delivery of the note, or any direction by plaintiff to defendant in that regard.

In Jarl v. Pritchett, 190 Iowa 1268, 179 N. W. 945, also cited by appellee, the note in question was not only signed in the foreign state but also personally delivered there to plaintiff's agent who mailed it back to plaintiff in Iowa.

Appellee cites Martin v. Martin, 205 Iowa 209, 217 N. W. 818, but in that case plaintiff sued on a renewal note that was not claimed to have been executed in Iowa. It superseded an original Iowa note but we held it became a new contract and that the suit was upon it and not on the "original indebtedness."

Both parties cite Acme Feeds, Inc. v. Berg, 231 Iowa 1271, 4 N. W. 2d 450. We find nothing in that case contrary to our holding in In re Young, supra. In fact we agree with the statement in the latter that the question involved there had never been decided in Iowa. There seems to be no later case that casts any doubt on the soundness of the decision in the Young case and we are of the opinion the rule announced in it must be applied here. 10 C. J. S., Bills and Notes, § 78d, pp. 513, 514.

There are of course cases involving contract entered into by offer and acceptance evidenced by correspondence in which the rule seems to be that where an offer is made by letter, authority to respond by the same medium may be implied. In such case it is held that the mailing of the letter of acceptance may constitute a completion of the contract and fix the place of contract. See International Transp. Ass'n v. Des Moines Morris Plan Co., 215 Iowa 268, 245 N. W. 244, and cases cited.

But such cases should be distinguished from one in which the payee in a note draws the instrument, dates it and makes it payable at the place of his own residence, and mails it to the maker in another state to sign and return. We are of opinion that in the latter case the trier of fact might well infer an intention of the parties to make it a contract of the state in which it is made payable. In fact it is generally held that the parties contract with reference to the law of the place of payment unless it clearly appears that they intended otherwise. 8 C. J. 92 (Bills and Notes, § 153); 10 C. J. S., Bills & Notes, § 49, Farm Mortgage & Loan Co. v. Beale, 113 Neb. 293, 202 N. W. 877; Sterrett v. Stoddard Lbr. Co., 150 Or. 491, 46 P. 2d 1023, 1028; Commercial Credit Corporation v. Boyko, 103 N. J. L. 620, 137 A. 534.

Defendant here is relying on the affirmative defense. The burden is

upon him to establish it. No presumption or inference arises to aid him. The note is dated and made payable at Corning, Iowa, and there is no evidence upon which it can be said as a matter of law that the cause of action did not arise in Iowa. Under the record as it stands we think it was error to direct verdict for defendant. Reversed.

Reversed.

Depositor Entitled to Amount on Deposit Without Furnishing Indemnity Bond for Lost Passbook

Myers v. Albany Savings Bank, Supreme Court, 57 N. Y. Supp. (2d) 488

A passbook of a savings bank is not negotiable and its possession does not constitute proof of right to withdraw moneys thereon, it only imports a liability of the bank to the depositor and an agreement to repay at such time and in such manner the depositor directs.

Plaintiff, depositor in defendant savings bank lost her passbook in 1937. At the time of her loss the plaintiff notified the bank and thereafter made repeated demands for payment of amount to her credit in said account. Defendant bank refused to do so unless plaintiff furnished defendant bank with a bond of indemnity as provided for the bank's by-laws. During the interval of eight years which have elapsed since the loss of the passbook no adverse claim has been made and the defendant bank has no reason to believe that any such claim exists.

It was held that under the circumstances the plaintiff was entitled to amount of moneys on deposit with the defendant bank to her credit without being obliged to furnish a bond of indemnity. The purpose of the bond could be solely for the protection of the defendant bank from loss or damage. The order of the court directing the defendant bank to pay the amount of plaintiff's deposit will protect the bank from any subsequent claim on the account.

Action by Catherine Myers against the Albany Savings Bank to recover a deposit in the defendant bank which the defendant bank refused to pay unless plaintiff filed a bond of indemnity. On plaintiff's motion for summary judgment under Rule 113 of the Civil Practice Act.

Summary judgment entered for plaintiff.

DeWitt & Schneeberg, of Binghamton, for plaintiff.

Cooper, Erving & Savage, of Albany (Edward W. Rooney, of New York City, of counsel), for defendant.

O'CONNOR, J.—The plaintiff moves for summary judgment under Rule 113 of the Civil Practice Rules. This action was commenced March,

NOTE—For similar decisions see B. L. J. Digest (Fifth Edition) § 1365.

1945, to recover a deposit in the defendant savings bank which the defendant refuses to pay unless the plaintiff files with the defendant a bond of indemnity. On May 29, 1937, plaintiff had on deposit with the defendant the sum of $3,260.69 as evidence by passbook No. 447583. Plaintiff lost her passbook in November, 1937, and notified defendant of the loss by letter on or about December 14, 1937, and defendant placed a stop payment on plaintiff's account.

Plaintiff states in her affidavit on this motion that she lost the passbook in November, 1937, and that she has made due and diligent search therefor and has been unable to find it; that she has made several demands on defendant to pay her the amount to her credit in said account but defendant has refused to do so unless plaintiff furnishes defendant with a bond of indemnity issued by a surety company or with personal sureties; that she has made diligent effort to obtain a surety company bond from several surety companies and also a bond with personal sureties and is unable to obtain either.

The parties have agreed that the sole question at issue is whether the plaintiff is entitled to the payment of the moneys on deposit in defendant bank without furnishing defendant with a bond to indemnify it against loss or damage.

Nearly eight years have elapsed since plaintiff lost her passbook and notified defendant thereof. During that time no adverse claim has been made and the defendant has no reason for believing that any such claim exists. There is no question as to the identity of the plaintiff as owner of the passbook and account.

The passbook is not negotiable and its possession does not constitute proof of right to withdraw moneys thereon; it only imports a liability of the bank to the depositor and an agreement to repay at such time and in such manner as he shall direct. Smith v. Brooklyn Savings Bank, 101 N. Y. 58, 4 N. E. 123, 54 Am. Rep. 653; Mills v. Albany Exchange Sav. Bank, 28 Misc. 251, 59 N. Y. S. 149.

If a third person has the passbook, with or without an assignment, the defendant is protected in paying the plaintiff the amount of her account until the third person presents the passbook with an assignment bearing the signature of the plaintiff. Gibraltar Realty Corporation v. Mt. Vernon Trust Co., 276 N. Y. 353, 12 N. E. 2d 438, 115 A. L. R. 322.

The filing of the bond is solely for the purpose of saving defendant from loss or damage. The by-laws of the bank must receive a reasonable interpretation and where it appears that the loss of the book is so long ago that there is no reasonable possibility of liability to any third person a bond of indemnity is not necessary and the insistence upon furnishing such a bond is unreasonable and unwarranted. Matter of Newsome's Estate, 179 Misc. 862, 38 N. Y. S. 2d 702; Matter of Havers; Meighan v. Emigrant Industrial Sav. Bank, 168 App. Div. 542, 153 N. Y. S. 312,

affirmed 222 N. Y. 578, 118 N. E. 1067; Ornbaun v. First Nat. Bank of Cloverdale, 215 Cal. 72, 8 P. 2d 470, 81 A. L. R. 1146.

An order of this court directing defendant to pay the amount of plaintiff's account will protect defendant from any subsequent claim on the account. Matter of Newsome's Estate, supra; Matter of Jacobsen's Estate, 178 Misc. 479, 35 N. Y. S. 2d 40; Banking Law, § 238, subd. 3.

Under these circumstances the defendant cannot possibly sustain any loss or damage. If payment is made by defendant to plaintiff no injustice will be done either party but the rights and security of both will be alike preserved. It is immaterial whether plaintiff is able to furnish a bond or not.

The plaintiff is entitled to summary judgment striking out the defendant's answer and for the sum of $2790.19, the amount of moneys on deposit with the defendant to her credit in account No. 447583, together with such interest as, according to the by-laws of the defendant, should be credited thereon to the date of the judgment, with costs and disbursements of the action and Ten Dollars ($10) costs of this motion.

Submit order accordingly.

Holder of Stolen U. S. Treasury Notes Held Disqualified As Holder in Due Course

Stiller v. Rogers, Appellate Department, Superior Court, California, 159 Pac. Rep. (2d) 457

Where a purchaser of negotiable instruments (U. S. Treasury Notes) is aware of the circumstances surrounding the source of said negotiable instruments, and despite such surrounding circumstances fails to make an inquiry which would disclose defects in the instruments, it is held that such failure to make inquiry constitutes wilful evasion of knowledge of facts and is evidence of bad faith disqualifying the purchaser from becoming a holder in due course of said instruments. The purchaser under such circumstances is chargeable with knowledge of all facts which an inquiry would have disclosed.

A woman charged with the stealing of money from the plaintiff in the instant case, upon arrest was found to have on her person the sum of $501 which sum was deposited with the sheriff under a "Sheriff's hold order." Evidence disclosed that all but $51 of said sum belonged to the plaintiff and the balance belonged to the woman. The currency stolen from the plaintiff was mostly in $50 bills and $450 of the money found on the person of the woman was in $50 bills. After the $501 was deposited with the sheriff, it was turned

NOTE—For similar decisions see B. L. J. Digest (Fifth Edition) § 630.

over to the County Treasurer as depository and there commingled with general funds.

Subsequent to her arrest the woman retained the defendant in the instant case as her attorney, and gave him a written order upon the sheriff to pay defendant $200 of the money deposited as attorney's fees. Upon defendant's insistence the sheriff delivered to the defendant the sum of $200 from the deposited funds.

Plaintiff brought suit against the woman and the defendant for money had and received and upon the above facts the trial court found for the plaintiff stating that the evidence warranted a finding that of the $200 received by the defendant $149 was money stolen by the woman from the plaintiff. It held that defendant was chargeable with the knowledge that the money was stolen. On appeal the finding of the lower court was sustained.

It was held that the order given to the attorney by the woman was merely an assignment of her interest, if any, in part of a fund under the control of the sheriff. The rules by which priority as between an assignee and a third party claiming the fund assigned is to be determined, are the same as those affecting the right of a holder of a negotiable instrument. The defendant's claim that he was a holder in due course of the negotiable instruments (U. S. Treasury Notes) was untenable.

The court further held that generally, as to negotiable instruments, a transferee, purchaser or assignee, where there is nothing about the circumstances attending the negotiation to excite suspicion, is not called on to make inquiry in order to avert the imputation of bad faith. Generally mere knowledge of facts sufficient to put a prudent man on inquiry, or mere suspicion of a defect, does not disqualify a purchaser from becoming a holder in due course unless he is guilty of bad faith.

However, in the instant case, the circumstances surrounding the source of the money were such that the defendant should have been put on inquiry and his failure not to proceed with an inquiry did not absolve him from being charged with knowledge of all facts which the inquiry would have revealed.

Action for money had and received by Frank Stiller against Betty Rogers and Bertram S. Harris. From a judgment for plaintiff, defendant Harris appeals.

Affirmed.

Joseph Duchowny and Bertram S. Harris, both of Los Angeles, for appellant.

Paul G. McIver, of Montebello, for respondent.

KINCAID, J.—The real question before us for determination is whether the evidence supports the court's findings that of the $200 received by the defendant lawyer from the Sheriff, on order of Betty Rogers, $149 was money stolen from plaintiff by her and that the defendant knew or should have known that such money was so stolen.

The fact that she did steal $918 from him is not questioned here, and the evidence is ample to show it.

Viewing the evidence, as we must, most favorably in support of the judgment, the record discloses facts readily sufficient to warrant the trial court in finding that, of the $501 found on the person of Betty Rogers at her arrest and deposited with the Sheriff under a "Sheriff's hold order," all but $51 thereof belonged to plaintiff and had been stolen from him by her. The $918 in currency so stolen from plaintiff was mostly in $50 bills and $450 of the money found on the person of Miss Rogers was in the form of nine $50 bills, the balance of $51 being in small currency. After its deposit with the Sheriff, it had been turned over to the County Treasurer as depositary and there commingled with general funds. The evidence further shows that such money was booked on September 29 and, on October 19, after the preliminary hearing of Miss Rogers, the defendant Harris was retained, received a written order upon the Sheriff to pay him $200 of the deposited moneys as attorney fees, and upon presentation was informed by the Sheriff that such moneys had a "hold" upon them. After some delay and at such defendant's insistence, the Sheriff delivered the $200 to defendant from such deposited funds.

The appealing defendant is an attorney at law. In accepting employment to represent Betty Rogers, he must have known that she was charged with the theft of $918 in currency from the plaintiff and that evidence sufficient to bind her over to the Superior Court for trial on such charge had been adduced at the preliminary hearing. He knew from both her and the Sheriff that a considerable sum had been found on her person at her arrest and had been impounded with a "hold order" thereon.

These facts would seem to bring the defendant within the provisions of section 19, Civil Code, which reads: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

Such facts would seem to deprive the defendant of the benefit of receiving the assignment of the currency as a negotiable instrument under the provisions of section 1758, Civil Code, as being one who paid value therefor in good faith, without notice of the theft of such money.

While United States treasury notes are negotiable instruments of the highest character (10 C. J. S., Bills and Notes, p. 428, § 23), when the defendant Harris received and presented the order from his client under which he now claims, such treasury notes had disappeared as such by having been commingled with the county's general funds. The order amounted only to an assignment of the interest, if any, of Miss Rogers in part of a fund under the control of the Sheriff. It would appear, however, that the rules by which priority as between an assignee and a

third party claiming the fund assigned is to be determined, are the same as those affecting the right of a holder of a negotiable instrument. First Nat'l Bank v. Perris Irrig. Dist., 1895, 107 Cal. 55, 64, 40 P. 45; Mohr v. Byrne, 1901, 135 Cal. 87, 90, 67 P. 11; Weiner v. Roof, 1937, 10 Cal. 2d 450, 452, 74 P. 2d 736. The rights of the defendant Harris as an assignee of such fund as against the claim of the plaintiff herein as the legal owner thereof may properly be tested in the light of the law applicable to a claim by such defendant that he is a holder in due course of a negotiable instrument.

As to negotiable instruments, it is the general rule that a transferee, purchaser or assignee, where there is nothing about the circumstances attending the negotiation to excite suspicion, is not called on to make inquiry in order to avert the imputation of bad faith. Generally, mere knowledge of facts sufficient to put a prudent man on inquiry, or mere suspicion of a defect, does not disqualify a purchaser from becoming a holder in due course unless he is guilty of bad faith, but they may evidence bad faith. 10 C. J. S., Bills and Notes, pp. 817, 818, § 324. "A purchaser, however, cannot shut his eyes to the surrounding circumstances, and, where the circumstances are so cogent and obvious that to remain passive would constitute bad faith, or are such as to justify the conclusion that the failure to make such inquiry would disclose a vice or defect in the instrument or transaction, such purchaser is charged with knowledge. Intentional ignorance, such as a willful evasion of knowledge of the facts, constitutes bad faith disqualifying the purchaser from becoming a holder in due course. Where circumstances which put him on inquiry are within his knowledge, he is chargeable with knowledge of all facts which an inquiry would have revealed." 10 C. J. S., Bills and Notes, p. 820, § 324. See also 8 Corp. Jur. 501. That these general rules are followed in California is shown by the following cases: Imperial Gypsum and Oil Corp. v. Chaplin, 1935, 4 Cal. App. 2d 109, 112, 40 P. 2d 596; Barthelmess v. Cavalier, 1934, 2 Cal. App. 2d 477, 487, 38 P. 2d 484; Siebenhauer v. Bank of California Nat l Ass'n, 1930, 211 Cal. 239, 241, 294 P. 1062; Smith v. Armstrong, 1927, 85 Cal. App. 624, 631, 260 P. 347.

It has also been held that a purchaser is not charged with the duty to make inquiry by the fact alone that he had knowledge of the want of honesty in business matters of the party from whom he received the instrument. Smith v. Armstrong, supra, 85 Cal. App. page 631, 260 P. 347. But with other circumstances it may show bad faith. ". . . It has been held that a purchaser who acquired a note without making an investigation, notwithstanding he knew that the seller was hard pressed and was an embezzler laboring under an expectation of a criminal prosecution, was chargeable with notice that the seller held the note as trustee." 10 C. J. S. Bills and Notes, p. 837, § 335, citing Bergheim v. McRae, 190 Minn. 571, 252 N. W. 833.

The trial court was warranted by the evidence in concluding that the defendant either knew or should have known that at least part of the moneys so received by him were stolen funds, and that such knowledge disqualified the defendant from becoming a holder in due course.

A cause of action based upon the common count of money had and received is proper under the facts here. "An action for money had and received 'may be successfully maintained even though not founded upon allegations showing an express privity of contract between the parties. This is so upon the theory that if one of the parties has received money due and owing to the other under circumstances which make it his duty to surrender the money to the rightful owner, the law will imply the promise to do so, and thereby create the requisite contractual privity.' " Coombs v. Minor, 1943, 60 Cal. App. 2d 645, 649, 141 P. 2d 491, 494; see 17 Cal. Jur. 602, Par. 1, p. 610, Par. 7.

TRUST and TAX DIGEST

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This section contains complete digests of current decisions of fiduciary law and taxation

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TRUST DECISIONS

Digest of current decisions pertaining to the law of trusts, wills, estates, descent, distribution and corporate fiduciaries

Administrator's Claim to Sum as Assets of Estate Not Within Jurisdiction of Probate Court Where Parties Non-Residents

Creed v. Keyes, et als, Supreme Judicial Court of Massachusetts, 1945 Adv. Sh. 929

Petition in equity in Probate Court by administrator with the will annexed of the estate of a public school teacher, who was a member of a contributory pension system for employees of the city of Boston known as the Boston retirement system. At his death there was payable by said system the sum of $13,519.48. There were several respondents, some of whom were non-residents of the Commonwealth. None of the non-residents were served with process upon the petition within the Commonwealth. The only service was by publication and mailing. The above sum was paid to one of decedent's brothers, in accordance with a "nomination" made before death. The recipient was a resident of New York. The administration filed the above mentioned petition against the said recipient and his brothers and sisters, all non-residents, whereby he sought to obtain the money paid over to the recipient. No evidence was before the court as to the present location of said sum. Apparently the recipient took the money with him to New York.

A brother-in-law of the decedent, and one of the residuary beneficiaries under an agreement of compromise, approved by the court, contended in favor of the claim of the petitioner to said sum on the ground that the "nomination" was invalid, stating as one reason because the decedent was coerced and unduly influenced into executing it. The non-residents respondents appeared specially, and denied the jurisdiction of the Probate Court. The judge sustained their position, and dismissed the petition, awarding costs and expenses to counsel for the petitioner and to counsel for the non-resident respondents. The petitioner appealed from said decree.

It was held that the probate court had no equity jurisdiction or power which that of the Superior Court would not have were the case begun there. The petition was brought under G. L. (Ter. Ed) c. 215, sec. 6 as amended, which gives the Probate Court jurisdiction in equity, concurrent with that of other courts in equity, "in cases involving in any way the estate of a deceased person." That statute gives the

Probate Court only "jurisdiction within scope of general equity jurisprudence as to the cases and matters therein named." The only way that the Probate Court could have jurisdiction to recover the money alleged to be assets of the estate would be if all the parties involved were before it. In the instant case there was no connection between the proceeding in rem for the probate of the will and the subsequent proceeding by the petitioner to bring into the estate the sum in question, as to extend to that subsequent proceeding a voluntary appearance entered in the earlier proceeding. There would be no such connection in existence had the subsequent proceeding been brought in the Superior Court and the fact that it is in the Probate Court made no difference in principle.

Merger and Termination of One Half of a Trust Upheld Where Life Tenant and Remainderman Same Person

Dreyfuss v. Kahn, Court of Chancery of New Jersey, 43 Atl. Rep. (2d) 887

Decedent by his will created a trust as follows:

"Third: All the rest, residue and remainder of my estate, both real and personal, I give, devise and bequeath unto my executors and trustees hereinafter named, or the survivor of them, in trust nevertheless as follows:

"I direct my executors and trustees to sell the real estate of which I may die seized as soon as the same can be disposed of advantageously in their discretion, and to invest the proceeds in bonds which are lawful for trust investment. The income from my estate shall be collected by my said trustees and divided equally between my brothers . . . during their lifetime. In the event of the death of either of my said brothers, the income from my estate shall be divided equally between the survivor and my niece . . . during the lifetime of my surviving brother. Upon the death of both my brothers, it is my desire that my entire estate shall pass to my niece . . . to her and her heirs forever." One of the brothers, a life tenant, died before decedent testate. Complainant in the instant case, is the niece named in decedent's will, who sought termination of one-half of said trust created by decedent's will. Complainant contended that one-half of the estate be turned over to her on the ground that there is a merger of the life estate to which she is a beneficiary with the remainder with which she became vested in the death of decedent testate.

It was held that the complainant was vested with the remainder, such vesting takes place at the time of the decedent's death, even though there may be existing life estates. The matter of distribution

was only postponed for the purpose of letting in the intermediate estate. The court further held that where the life estate and the remainder were vested in the complainant, there was a merger and the trust was terminated, particularly where the trustee had no other duty other than to reduce the trust estate to possession and to pay the income to the life tenant. The merger and termination was effective pro tanto (for so much) even though the entire estate was not affected. The mere fact that the extinguishment of the trust was only as to one-half of the estate was no impediment to its merger and termination.

Election of Widow to Take Under Law of Intestacy—Acceleration of Remainders

Estate of France, Supreme Court of Pennsylvania, Eastern District, Nos. 268, 269, January Term, 1945

Testator by his will directed that upon the death of his wife ten years after his decease a trust for her benefit was to terminate, and testator's son was within ninety days from her decease to exercise an option to purchase from testator's trustees certain stock upon terms set forth in his will. Subsequent to testator's death the widow elected to take against the will.

It was held that the court could properly hold that an election by the widow to take against the will was not tantamount to her legal death and determined the date of such death to be ten years after testator's death, and extend the time within which the son could exercise such option.

Trustee Precluded from Sale of Securities Increasing Capital But In Derogation of Income Benefits of Income Beneficiaries

Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Gilmore Court of Chancery of New Jersey, 43 Atl. Rep. (2d) 667

A trustee had the opportunity to dispose of tax exempt government and municipal bonds at a price which would increase the principal of the trust fund. Upon being advised of the proposed sale of said bonds the life tenants and remaindermen objected to the sale. The objection of the life tenants and remaindermen was principally that the requested sale of the tax exempt bonds would discriminate against and result in great loss of income to them and that it would eventually depreciate the value of the principal of said trust. The trustee thereupon sought instructions as to its duty with respect to the sale of said securities.

It was held that the trustees were justified in seeking the aid of the court concerning its duties notwithstanding the discretionary power reposing in the trustee. The trustee was advised that it was not its duty to capture the premium which would result from the sale of the tax exempt bonds, because by doing so it appeared that an unwarranted burden would be imposed on the income of the life tenants and vested remaindermen. The trustee for beneficiaries in succession was under a duty to the successive beneficiaries to act with due regard to their respective interests and to take care not merely to preserve the trust property but to make it productive so that a reasonable income would be available to the life tenants. The trustee is likewise under a duty to the remaindermen to take care to preserve the trust property for them.

The trustee was not under a duty to beneficiary entitled to income to endanger the safety of the principal in order to produce a larger income. The trustee was under a duty to the life tenants not to sacrifice income for the purpose of increasing the value of the principal. The trustee should not unnecessarily show a preference either for the present beneficiaries or those who would receive income or principal later. If the trustee has an election of taking one of several courses it must take, if possible, that which will not benefit one at the expense of the other.

Vesting of Remainder to Persons Described As a Class

Everhard v. Brown, Court of Appeals of Ohio 63 N. E. Rep. (2d) 901

A bequest of a life estate, with remainder over to a class of persons, not named but described is not in and of itself to be regarded as manifesting the intention of the testator that such person only should take in remainder as could answer the description at the termination of the life estate. Clause in decedent's will pertinent to said rule is as follows: "My trustees . . . shall proceed to divide and distribute the residue of my estate among the nephews, nieces, grandnephews and grandnieces of myself, and the nephews, nieces, grandnephews and grandnieces of my wife, share and share alike, grandnephews and grandnieces receiving the same share as the nephew and nieces."

It was held that in the absence of clear testamentary intent, it would be deemed to have been the will of the testator that the remainders created by such a bequest should vest in interest and title at once upon his death in the persons then comprising the class described, and that the right of possession should be postponed until the life estate became extinguished.

The testator was presumed to use words in their ordinary and primary sense and meaning; and in the absence of a clearly expressed

intention, the use of the words "nephew" "niece" "grandnephew" and "grandniece" in creating a class of persons to inherit was to be construed to include only those persons who came within that degree of kinship.

The court further held that accrued interest on non-coupon bonds, although payable at the termination of the life estate, was apportionable in respect of time as between persons successively entitled, for though payable periodically, interest accrues from day to day.

Trust Cannot Be Created in Proceeds of Government Insurance Where Beneficiary Not Members of Class Within Provisions of Act

Jones v. United States, District Court, D. Massachusetts, 61 Fed. Supp. 406

On March 12, 1945, plaintiff brought suit against the United States and one Jones, seeking to secure the payments made and to be made to Jones on a policy of insurance for $10,000 issued in 1943 on the life of a soldier in the United States Army. The policy was issued under the provisions of the National Service Life Insurance Act of 1940 as amended, 38 U. S. C. A. sec. 801-818. The soldier named his brother, the defendant Jones, beneficiary. Prior to the issuance of the policy the soldier wrote a letter to his brother informing him of the policy of insurance, that he was named beneficiary, and further stated that the brother was to divide the proceeds of the policy as follows: $4,500 "for you to help take care of mother," $4,500 for Gwen Koffman, a friend, and $1,000 for the plaintiff. Thereafter, the brother acknowledged the receipt of the letter and assured the soldier that he would carry out the latter's instructions. Subsequently, the soldier died while in the service, and certain payments of the policy were made to the brother. Gwen Koffman, an intervenor, by permission of the court sought to recover from the brother 45 per cent of the policy proceeds received and to be received by him, on the contention that since the soldier instructed his brother to pay $4,500 of the $10,000 to her, a trust of the proceeds was created for her benefit as soon as it was received by the brother.

Plaintiff contended that Gwen Koffman was not one of a class eligible as a beneficiary of the insurance taken out as provided in Section 802 (g) of the National Service Life Insurance Act of 1940, and to allow her to establish that the trust existed for her benefit would be circumventing and contrary to intention of Congress in enacting said act.

It was held that the contention of the plaintiff was correct. Section 802 (g) provides that the insurance taken out under provisions of the Act shall be payable "only to a widow, widower, child . . . parent, brother or sister of the insured."

Gwen Koffman was not a member of this class. The rule applicable in such a case is stated in Scott on Trusts, Vol. 1, Sec. 79.9, and is as follows: "If an interest can be transferred only to members of a particular class of persons, a trust of the interest cannot be created in favor of a person not within the class."

Right of Sole Survivor As Beneficiary to Part of Principal Bequeathed By Will

In re Van Ghele's Estate, Surrogate's Court, 57 N. Y. Supp. (2d) 287

Decedent testate by his will made some small outright gifts and then put the remainder of his estate in trust for the support and maintenance of decedent's son. The son died and the trust principal is distributable. Question was raised respecting the disposition of one-quarter of such principal. The text of the will pertinent to the question at issue is as follows:

"On the death of my said son, Charles V. L. Van Ghele, or on my death, if he died before me, then I give, devise and bequeath three-quarters of my whole estate as follows:

"Should any of my aforesaid relatives die before me, or before my said son, . . . leaving issue, his or her share hereunder to go to such issue, but should any die without issue, his or her share to go to the remaining relatives, and the remaining one-quarter to be divided equally between my friends, (naming three individuals); share and share alike or to the survivor or survivors."

Two of the individuals named to take the remaining one-quarter died before decedent's son but survived decedent. Only one of this group of three survived both the son and decedent. The question was whether he took the whole one-quarter fund or whether the survivorship referred to in the last clause of the will above referred to was a survivorship of the decedent rather than of the son in which event the quarter was payable in equal shares to the survivor of the three and the respective estates of the two who predeceased the son.

It was held that the sole survivor of the three individuals named in decedent's will was entitled to the whole quarter fund and that the estates of the two other individuals of said group who died before decedent's son were not entitled to share in said fund. All the gifts of trust principal were intended to be effective only when the son died and only to persons existent at the time of the son's death.

It was further held that the trustees had the right to retain certain foreign securities in view of the tenor of decedent's will.

Beneficiary of Income Payments Entitled to Reimbursements Where Trustee Applies Portion of Income to Payment of Debt on Trust Estate

Mairs v. Central Trust Co. Supreme Court of Appeals of West Virginia, 34 S. E. Rep. (2d) 742

A testamentary trustee under the terms of the will was required to pay monthly to the beneficiary of a trust a stipulated sum out of the net income of the trust estate. The trustee, acting in another capacity relative to the property of the testator, without authority applied a portion of the net income to the payment of interest and principal of a debt which was a lien on the principal part of the trust estate.

It was held that beneficiary was entitled to reimbursement with interest from the due date of each installment. The court further held that under provisions of state statute interest was not due on the legacy until expiration of one year from the order conferring authority on the first personal representative of the testator, and not then unless a report by the commissioner of accounts of the claims against the estate was made and confirmed and no appeal is taken from the order of confirmation. There being no report so made and confirmed by said commissioner against the estate, the failure to show such report precluded the allowance of interest on the legacy.

It was further held that royalties derived from the production of gas was principal rather than income, where the well from which such gas was produced was not open at the time of the death of the owner of the preceding estate of inheritance or the opening of such well has not been specifically authorized by him.

Rights of Inheritance of Aliens to Estate Subject to Control of State Law

Estate of Bevilacqua, District Court of Appeals, California, 70 A. C. A. 679

The issue raised in the instant case involved the right of administration, as between a first cousin of decedent, a resident of California, and the public administrator representing the widow and four adult children of the decedent, all of whom were aliens, resident in Italy. A state law (Secs. 259, 259.1 and 259.2 of the Probate Code, 1941) provides in effect that the right of non-resident aliens to take real or personal property in California by succession or testamentary disposition depends on the existence of a reciprocal right granting citizens of the United States the same rights in the country of which the alien is an inhabitant and citizen. The public administrator contended that the

state law was unconstitutional, being a violation of the commerce clause of the constitution of the United States; as an invasion of the treaty making power and of the war powers of the United States.

It was held that the contention of the public administrator was not tenable. No evidence was introduced with reference to the existence of any reciprocal right of inheritance granted by Italy (the country of the alien claimants) to citizens or residents of the United States which could have recognized a prior right of inheritance in the alien claimants. The first cousin's contention, that he as a presumptive heir was entitled to succeed to the estate and thus have the right to letters of administration was upheld. The right to control the rights of inheritance are wholly a prerogative of the state.

Court Could Properly Confirm Acts of Trustees Acting as Trustees De Son Tort

Pease v. Kendall, Supreme Court of Illinois, 63 N. E. Rep. (2d) 2

Decedent testate by his will gave all his property to his son Edwin, in trust, with broad powers of management and sale. The will contained certain provisions and conditions upon which the son Edwin might become the absolute owner of the property, and in case he did not exercise that option and the trust should be still pending, the property should go as his son Edwin should appoint and direct by his last will and testament, and in case he did not make such will there was a gift over to the estate. Edwin died testate, without having complied with the condition upon which he could have acquired the absolute title to the property. By his will he gave his wife, only such property as the statute of descent gave her, devising and bequeathing the remainder of the estate to his son in fee.

Soon after Edwin's death, his widow demanded delivery to her of the contents of a safety-deposit box, which contained securities registered in Edwin's name as trustee of the last will and testament of decedent testate, which was refused. Edwin's son about that time applied ex parte to the court for appointment of trustees to manage and control the estate under court supervision, and the court appointed two trustees, who qualified and filed an inventory, and collected the rents and dividends and deposited the same in a bank in their names as trustees. They procured an order authorizing them to employ counsel to oppose a petition which Edwin's widow had filed in the courts of California for family allowance, claiming that Edwin was a resident of California. The trustees opposed this action in California and were successful in preventing a decree establishing that Edwin was a resident of that state.

In the meantime, Edwin's son filed a complaint to construe the will

of his father and decedent testate to which all parties in interest were made parties. He then filed an amended complaint for the ratification and confirmation of the ex parte appointment of trustees and for the preservation of the trust assets and to prevent waste. The court thereupon entered a decree ratifying the ex parte appointment of successor trustees and allowed the sum of $20,000 as fees and expenses to the trustees and fees to their attorneys.

Edwin's widow appealed from said decree on the contention that no trust or equitable estate existed and therefore successor trustees could not be properly appointed and further that the court had no jurisdiction to appoint trustees ex parte without service of process, and all orders made in that proceeding were void. Petitioners contended that a trust was in existence, which required the appointment of a trustee and that the court had jurisdiction to appoint trustees and to confirm and ratify their prior action as trustees de son tort (trustees by their own wrong) and that the decree of the court was warranted on the basis of the complaint.

It was held that though the court in the first instance lacked authority to appoint successor trustees, without notice, and without a prior construction of whether or not a trust existed, the court nevertheless could, with all parties at interest before it, consider the acts of the trustees as trustees de son tort and, if no injury to the interested parties appeared, and be permitted to confirm its original appointment and the acts thereunder of the trustees de son tort.

Delay In Sales of Nonproductive Trust Capital by Parties in Interest by Advances to Trustees Held Proper

Estate of Brandstein, Surrogate Court, New York 113, New York Law Journal, 1107

Where all parties entitled to share in an estate and also presumptively entitled to share in the proceeds of the sale of the property to be held in trust agree, in conference with the court, to a procedure which places into the hands of the trustees as advances sufficient funds to carry the nonproductive trust capital until reasonable efforts could be made to effect a sale in the market at a fair price, it is held that such action by the parties in interest is proper.

TAX DECISIONS

Digest of current decisions pertaining to the law of taxes on trusts, estates and gifts

Administration Expenses in Connection With Property Held As Tenants By the Entirety

Estate of Hartley v. Commissioner, U. S. Tax Court, 5 T. C. No. 76

The surviving spouse of decedent, who died in 1941, agreed to pay certain amounts as executors' commissions and attorneys' fees in connection with property owned by decedent and his wife, as tenants by the entireties, in the gross estate. It is held that the expenses paid in connection with entireties property, not being allowed by state law as an expense of administering the estate, are not deductible under Code Section 812 (b) (2).

Full Value of Trust Held Subject to Estate Tax

Weadock v. Kavanagh, Collector of Internal Revenue, U. S. District Court, Michigan, No. 4192

Philip H. Grennan died September 4th, 1936 having on August 25th, 1931, placed certain assets valued at the date of his death at $65,074.76 into a double trust—one for the benefit of his daughter, Evelyn, the other for his son, Paul. By the terms of the trust Evelyn was to receive $65 per month during the donor's life, subject to the provision that the donor could "during his lifetime give written instructions to the Trustees to increase the amount of said payments to his daughter, or to decrease such payments, or to make no payments of income to her but instead add the said income to the principal of her trust estate." Paul was to receive the income from his half in monthly or quarterly installments subject to the provision that the Trustees should pay Paul as "the donor may in writing direct," adding any undistributed income from Paul's share to the principal of Paul's half.

Two other clauses materially affect the interpretations to be placed upon this trust and they are, first,

"Paragraph Six: If either or both of the Donor's children should predecease him, the Trustees shall terminate the trust estate of such deceased child or children forthwith, and assign and transfer said trust estate or estates to the Donor absolutely." and,

"Paragraph Six B: That if Paul Grennan should die leaving neither wife nor children, and if Evelyn Grennan should die without leaving issue, then the trust estate shall be terminated, and assigned and transferred absolutely and forthwith to the Donor's heirs-at-law."

The District Court sustained the Commissioner by holding the full value of the trust taxable as part of the gross estate because of donor's control over the income and the possibility of the property reverting to him in the event life tenants predeceased him.

Disclaimed Legacy Falling into Charitable Residue

Commissioner of Internal Revenue v. Estate of Macaulay, U. S. Circuit Court of Appeals, Second Circuit

The portion of a legacy that falls into decedent's residuary estate by reason of a disclaimer by the legatee is exempt from estate tax in the same proportion that the residuary estate is bequeathed to charities, even though decedent's death occurred in 1938, prior to February 10, 1939, the retroactive effective date of the 1942 amendment providing that the charitable exemption shall include the interest which falls into any charitable bequest as a result of an irrevocable disclaimer. The amendment is held to have the effect of clarifying or declaring rather than of changing existing law.

Trust Created During Life Held Not Subject to Estate Tax Where Transfer Was Absolute

McKinistry v. Collector of Internal Revenue, U. S. District Court, Illinois, Civil Action No. 44C 177

On September 10, 1934, Addis E. McKinstry, then sixty-four years old, executed a trust agreement with the Northern Trust Company and his son, Ross W. McKinstry. By the terms of the trust instrument, income from the trust property was to be paid to settlor's wife (Elizabeth B. McKinstry), then sixty-four years old, during her lifetime; if the trustees deemed advisable, the corpus—even the whole corpus—might be paid to her, but if not so paid, upon her death the remaining corpus was to be delivered to the settlor's son, Ross W. McKinstry, who was then thirty-seven. The son (who was one of the beneficiaries) was given power to appoint by will among his wife and his issue in case he predeceased his mother, and the trust instrument contained a proviso that if the son did predecease his mother without having exercised the power of appointment, the property should go, at his mother's death,

to his descendants (of whom there were then two, aged eleven and eight, respectively).

The settlor thereupon transferred to the trustees securities of a value of $184,000 and paid the gift tax thereon.

It was held that the transfer was not part of the gross estate for purposes of the estate tax. The gift made by Addis E. McKinstry under said trust agreement of September 10, 1934 was absolute and unconditional and was complete at that time; he parted with all right to the income and principal of the trust; he waived all right to revoke, amend or change the trust agreement in any way; he parted with all control over the trust property; he retained no interest in the trust and no power of appointment thereof; in fact, in the language of the authorities, he retained no "string" or "tie" which would require or justify the inclusion of said trust in his estate at the time of his death, and no part thereof is taxable for Federal Estate Tax as part of his estate.

Reciprocal Trusts—Reservation of Life Incomes

Estate of Eckhardt v. Commissioner, U. S. Tax Court, 5 T. C. No. 80

Each decedent created a trust at about the same time naming the other as life beneficiary. Decedents owned certain property jointly. Under each trust, each decedent transferred an undivided one-half interest in trust. Upon the facts, it was held that the trusts were reciprocal and were created in consideration of each other, and the corpus of the trust created by each decedent is includible in the other's gross estate under section 811 (c) of the I. R. C.

Gifts Held Not in Contemplation of Death

Dickson v. Collector of Internal Revenue, U. S. District Court, Indiana, Civil Cause No. 877

In 1935, decedent transferred 275 shares of common stock to each of his three children, resulting in a gift to each child of approximately $27,765. Decedent's principal motives in making the gifts were to provide security for a widowed daughter and to treat all of his children equally. A subordinate motive for the gifts was the saving of income taxes on disposition of the stock. In 1936, decedent's children sold the shares of stock and used the proceeds to purchase single premium insurance policies on the life of decedent, which were issued in conjunction with annuity policies purchased by decedent himself. It's conceded that the life insurance policies would not have been issued in the absence of

the annuity contracts. Decedent died in March 1942, without having possessed any incidents of ownership in the life policies. The issue before the court was whether the transfer of stock to the children was includible in the gross estate. It was held that the transfer was not made in contemplation of death and that the value of the transfers is not includible in decedent's gross estate.

Accumulated Income of Revocable Trusts Taxed As Gifts to Beneficiaries

Richardson v. Commissioner, U. S. Circuit Court of Appeals, Second Circuit, No. 154

In 1932 taxpayer's wife credited five trusts in favor of five children. Under each trust the taxpayer was named as trustee with the right to terminate the trust in his own favor. He exercised this right on December 20, 1941. The trust instruments provided for accumulation of income to age 30. During the period from 1933 to 1935 accumulations amounted to $400,000 and Commissioner contended that they constituted gifts. It was held that in effect the trust property was given to the taxpayer by his wife at the time she created the trusts, and that when the taxpayer, as trustee, set aside income received by him in 1933, 1934, and 1935, as "accumulations" for the beneficiaries, he thereby made completed gifts.

Irrevocable Trust Held Not Subject to Estate Tax

Post v. United States, U. S. District Court, N. Y., Civil No. 4932

The trust instrument in the instant case provided that upon death of the life tenants the principal would pass to their children then living, or failing any such issue, then to the lawful issue then living of the trustor. The Commissioner contended that the facts brought the case within the rule of Helvering v. Hallock (1940) 309 U. S. 106.

It was held that the transfer was not taxable on the ground that under the trust instrument the devolution of the property, was wholly independent of the settlor's death and in no way contingent upon it. There was no reversion provision for the settlor or for any other exercise of power by the settlor. There is no suggestion in the whole instrument to indicate any power in the settlor of disposition or control over the trust fund or its income whether she died before the termination of the trust or subsequent thereto. The most that can be said is that the trust fund might pass "to the lawful issue then living of the trustor." But in the

event that that contingency arose, such surviving issue of the testator—and she had fourteen in number,—would according to the law of the State of New York, as set forth in Guaranty Trust Company v. Harris, 267 N. Y. 1, take "their contingent interests by purchase and not by descent." In the instant case the inference is inevitably that the settlor reserved no economic or any other benefit of any kind. It was a purely inter vivos gift. Viewed in the strictest light, it cannot be interpreted as a devious devise to avoid an estate tax by parting with property during her life.

Transfer in Trust Held Completed

Estate of Kobb v. Commissioner, U. S. Tax Court, 5 T. C. No. 68

Grantor set up a trust, the corpus of which was to be divided into equal parts, one for each of his three grandchildren then living, and into additional equal parts as after-born grandchildren might be designated by him in writing during his lifetime. Until such issue reached the age of 30 years, the entire income was payable to decedent's daughter. Gift taxes were paid on the transfers made. In 1939 the grantor relinquished this reserved right, after having designated but one such after-born grandchild as beneficiary. It was held that the several transfers were completed gifts, for tax purposes, when made. They were then so taxable and not upon the decedent's later relinquishment of his contingent right to name after-born grandchildren.

Income Tax Loss Allowed on Sales Involving Members of a Family

McWilliams v. Commissioner, U. S. Tax Court, 5 T. C. No. 73

By specific statute, no deduction is allowable for losses incurred in sales or exchanges between members of a family. Nevertheless, the Tax Court has reaffirmed its holding that this statute does not apply to a sale of stock on a stock exchange, even though the same stock is simultaneously purchased on the exchange by a member of the family.

In this case during the years 1940 and 1941, John P. McWilliams gave his broker orders to sell at market a certain number of shares of a particular stock from each of the accounts of himself, his wife and his mother. At the same time he instructed the broker to purchase, after each such sale, a like number of shares of the same stock for one of the other two accounts. The admitted purpose of these sales was to establish a tax loss in each of the accounts. It was held that where listed securities are sold through a stock exchange to an unknown purchaser and like

securities are purchased by a member of the seller's family from an unknown seller, the transaction does not constitute a sale of property between members of a family upon which a loss deduction is denied by the law.

Annuities by Will

Frank M. Curry v. Commissioners, U. S. Tax Court

Taxpayer was a widow of the decedent and beneficiary under a testamentary trust providing for payment to her for life of the entire income of the trust, except that, as her two children should reach the age of 25 years, certain payments should be made to them also, but only out of income in excess of $25,000. It was further provided that in the event that for any year the income of the trust estate shall be less than $10,000, the trustees shall have the right to make up the deficiency out of payments from the principal of the trust estate. For each of the taxable years taxpayer's returns were prepared on the basis that $10,000 of the distributable income of the trust constituted an annuity, no amount of which was taxable to her. It was held that by the language of the instrument the testator intended to give to the trustees only a discretionary right to invade the corpus, using "shall have the right" in a permissive sense, and that hence no annuity was created. The entire amount of the income paid to taxpayer by the trust constituted income currently distributable to her and taxpayer is taxable thereon under Secs. 22 (a) and 162 (b) of the Act of 1938 and the Code.

Legal Fees Deductible

Cammack v. Commissioner, U. S. Tax Court, 5 T. C. No. 52

Taxpayer, owner of Kreuger & Toll stock, received dividends through 1931. In 1932, when the corporation was declared bankrupt, taxpayer deducted cost of stock in figuring income tax liability. Deduction having been disallowed, taxpayer paid additional tax, and sued for refund. In 1940, after recovery, he paid legal fees and claimed deduction for same. It was held that the legal fees are deductible under Sec. 23 (a) (2) of Internal Revenue Code, as stock was bought "for the production of income."

INVESTMENT AND FINANCE

Edited by OSCAR LASDON

National Service Life Insurance

ACCORDING to the Institute of Life Insurance, only 20 per cent of our returning veterans are keeping their National Service Life Insurance policies in force after leaving the armed services.

Because many veterans may, on more mature consideration, wish to reinstate their policies, and because the local banker is likely to be queried about the proper procedure to be followed in securing such reinstatement, the following information compiled by the Institute should be of great practical assistance. This information may be digested in question and answer form.

Q: If a National Service Life Insurance policy has lapsed, can it be reinstated?

A: Yes. At any time while in the service or within six months of leaving the service, or, after that, within three months of the lapse, the policy can be reinstated if health is as good as at time of lapse. However, it is necessary to make payment of one month's back premium in the case of term policies, or a payment of all unpaid back premiums, plus 5 per cent interest compounded, in the case of converted policies.

Q: How are premiums paid on National Service Life Insurance policies after leaving the service?

A: All payments are made direct to the Collections Subdivision, Veterans Administration, Washington, 25, D. C. These payments should be made regardless of whether a premium notice or receipt is received; payments should be directed to the Treasurer of the United States; the cancelled check or money order stub should be retained as evidence of payment, until a receipt is received. If no receipt or premium notice is received after four months' payments have been made, notice to this effect should be given to Veterans Administration in Washington. The huge volume of transactions in a system established almost overnight naturally causes some delay.

Q: Is any particular information necessary in corresponding with the Veterans Administration about these policies?

A: Yes. To minimize delay and make certain the correspondence will reach the correct department, every communication should carry the full name, service serial number, complete present address and insurance policy number. Identification by name only is unsatisfactory, since there may have been

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thousands of the same name in the service.

Q: Should the veteran convert his service policy to a permanent form immediately upon his return?

A: It is not necessary for the returning veteran to convert his service policy to a permanent form until he has had a chance to determine his future needs and knows how much and what kind of insurance is best suited to those needs. For most of the younger veterans and those with well established programs to return to, it might suggest fairly quick conversion. This concurs with the recommendations of the armed forces, which have always recommended that veterans do not convert these policies either while in the service or for some readjustment period after returning home, in order to better determine just these needs. Veterans have from 1948 to 1953 to convert their service policies, depending on the date of issue of their policy.

Q: Does the veteran have to keep in force the full amount of the service policy?

A: No. If he finds it difficult to maintain the full policy, he can reduce it to any multiple of $500, but not less than $1,000 aggregate. Request for the reduction should be made direct to the Veterans Administration in Washington and should be accompanied by the first full premium (annual, monthly, etc.), without waiting for notification of the change. Payments should continue to be made without waiting for this notice, as it may take some time to go through the necessary routine and, in the meantime, failure to make any payment would result in lapse of the policy.

Bank of England

The Bank of England, known also as the Old Lady of Threadneedle Street, is being nationalized by the British Government. The bank was first established in 1694 as the world's first joint stock bank and has long been a symbol of private enterprise. Today, it represents the British Labor Government's first conquest in nationalization.

This step fits in with the Labor Government's five year plan of full

employment and production. Although it is not anticipated that the ordinary work of the bank will be interfered with, its powers to control industry are obvious and will undoubtedly be used. The Bank, under the terms of the nationalization legislation, may request information from and make recommendations to any banks or bankers. If authorized by the Treasury, it may issue directions to effect these requests or recommendations. Heretofore, the Bank of England has only "advised" the banking fraternity.

Under the terms of the legislation, the Crown is empowered to appoint the governor of the Bank, his deputy and directors. And while the bank's management is entrusted to the directors, it is subject to any directives from the Treasury after consultation with the governor.

Stockholders of the bank are not being treated unfairly. They are being compensated with Government bonds in amount sufficient to yield them an income equal to the average paid in the form of Bank dividends over the past twenty years. About £400 in per cent bonds is being received for each £100 in par value of Bank stock. While this is satisfactory from the standpoint of yield, it omits from consideration the huge hidden reserves of the institution.

Cyclical Budget Balance

In a statement entitled "Toward More Jobs and More Freedom," the Committee for Economic Development subscribes to the theory that the Federal budget should only be balanced at certain high levels of employment; at other times, deficit spending should be used to cushion economic fluctuations. This policy, it is assumed, will assist in leading to full employment, with 53 to 56 million people gainfully employed.

The CED report urges immediate appointment of a President's Commission on Full Employment, as well as a Joint Congressional Committee on Full Employment. Such steps, it is anticipated, would help create "the individual's confidence in the continuity of his income," . . . "the business man's confidence in prospects of a reasonable profit," . . . and "the increased output per worker" deemed essential to consumer spending, capital investment, and a steady rise in real wages.

National Debt

The United States Chamber of Commerce has issued a factual discussion of "The Public Debt" and notes therein that our economy for many generations will feel the influence of a debt of unprecedented proportions, "a heritage from war and depression."

Before the budget is brought into balance, it is estimated that the debt may hit a peak of $300 billion. The size of the debt is significant, not only from the standpoint of substantially increased interest and amortization

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charges, but also because of the fact that it has become an integral part of our economic structure. And in this connection, the ramifications of its influence are many and varied.

It is apparent that the debt mechanism constitutes a means of redistributing wealth and income. It is also obvious that experimenting with this mechanism has dangerous possibilities. Will our administrators transcend the bounds of financial management? The power to influence economic forces may tempt them into the realm of a planned economy.

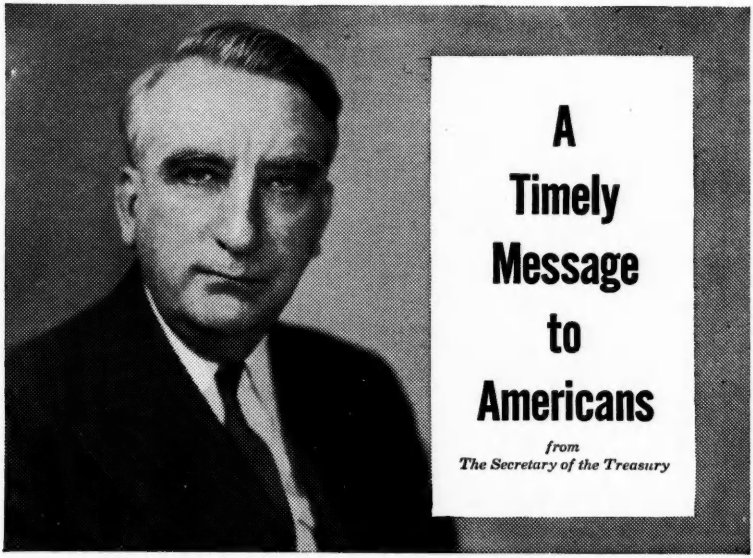
Also consider the fact that Federal debt policies have become inseparably interwoven with the operations of the banking system. Because our banks are the largest holders of Government securities, they are vitally concerned in the debt management program. Accordingly, the Treasury must continue to have banking cooperation in both deficit-financing and refunding operations.

All in all, the public debt has become interwoven with the economic life of the nation. It is now a basic factor which must be taken into account in any consideration of postwar policies. Appropriations, taxation, plans to assure full employment are all involved.

"It rests with Congress," states the report, "whether the debt be permitted to continue its upward trend as part of acceptance of liberal spending theories or whether a halt be called on further deficit-financing and a determined effort be made to reduce the debt burden of present and future generations.

"Involved in the issue is the question of asumption by the Federal government of direct responsibility for employment, without regard to the effect upon the debt, as against a primary purpose of Congress to create conditions favorable to the fullest utilization of the job-creating potentialities of the private enterprise system.

"At stake is the financial integrity of the United States Government and the value of the dollar."



A Timely Message to Americans

from
The Secretary of the Treasury

America has much to be thankful for.

Abroad we have overcome enemies whose strength not long ago sent a shudder of fear throughout the world.

At home we have checked an enemy that would have impaired our economy and our American way of life. That enemy was inflation—runaway prices.

The credit for this achievement, like the credit for military victory, belongs to the people.

You—the individual American citizen—have kept our economy strong in the face of the greatest inflationary threat this nation ever faced.

You did it by simple, everyday acts of good citizenship.

You put, on the average, nearly one-fourth of your income into War Bonds and other savings. The 85,000,000 owners of War Bonds not only helped pay the costs of war, but also contributed greatly to a stable, prosperous postwar nation.

You, the individual American citizen, also helped by cooperation with rationing, price and wage controls, by exercising restraint in your buying and by accepting high wartime taxes.

All those things relieved the pressure on prices.

THE TASK AHEAD

We now set our faces toward this future: a prosperous, stable postwar America—an America with jobs and an opportunity for all.

To achieve this we must steer a firm course between an inflationary price rise such as followed World War I and a deflation that might mean prolonged unemployment. Prices rose more sharply after the last war than they did during the conflict and paved the way for the depression that followed—a depression which meant unemployment, business failures and farm foreclosures for many.

Today *you* can help steer our course toward a prosperous America:

—by buying all the Victory Bonds you can afford *and by holding on to the War Bonds you now have*

—by cooperating with such price, rationing and other controls as may be necessary for a while longer

—by continuing to exercise patience and good sense with high faith in our future.

The challenge to America of switching from war to peace with a minimum of clashing gears is a big one.

But it is a small one compared to the tasks this nation has accomplished since Sunday, December 7, 1941.

Fred M. Vinson

Secretary of the Treasury

A Government message prepared by the War Advertising Council; and contributed by this magazine in cooperation with the Magazine Publishers of America.

All in favor raise right hands . . . *with wallets*

Naturally we want our boys home.

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And after these fellows get home—what then?

We want to take care of the injured ones, of course. We want to give our boys a chance to finish their education. We want to see that there are plenty of decent jobs for them.

How much are we willing to do about that?

If we're really serious about wanting to see that our men get what they have so richly earned, we'll buy *extra* Bonds in the Victory Loan.

Now's the time. Let's have a show of hands—with wallets—to prove how much we really want to hear that familiar voice yelling "It's *me!*" Let's prove, with pocketbooks, that we can do our job as well as they did theirs.

THEY FINISHED THEIR JOB—
LET'S FINISH OURS!

VICTORY LOAN

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